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No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GERALD E. SMALLWOOD,
Petitioner,

v.

UNITED AIR LINES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. In order to resolve issues remaining on remand, when may the district court reopen the record and take additional evidence when the court of appeals did not so direct and evidence on the issues was presented at the original trial?

II. Does the separation of liability and damage issues established in the constitutional case of *Mt. Healthy School Board of Education v. Doyle*, 429 U.S. 274 (1977), apply in ADEA cases?

III. Did the Fourth Circuit misconstrue the record to justify its decision that the District Court's "conclusions" were clearly erroneous?

IV. Even if the District Court's "conclusions" were clearly erroneous, should Smallwood, nevertheless, be awarded back pay from the time of the discrimination through the second trial as allowed under similar circumstances by the Third Circuit in *Rodriguez v. Taylor*, 569 F.2d 1231 (1977), and the Eighth Circuit in *Houghton v. McDonnell Douglas Corp.*, 627 F.2d 858 (1980)?

V. When a defendant has willfully violated the ADEA, may it avoid a damage award by attempting to prove that the plaintiff does not meet certain subjective and non-job related criteria?

VI. Did the Fourth Circuit err in denying Smallwood's cross-appeal?

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OPINIONS BELOW

Smallwood v. United Airlines, Inc., 661 F.2d 303, 26 F.E.P. 1655, 27 E.P.D. ¶ 32130 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007, 73 L.Ed.2d 1302, 102 S.Ct. 2299 (1982).

Smallwood v. United Air Lines, Inc., 728 F.2d 614, 33 E.D.P. ¶ 34185, 34 F.E.P. 217 (4th Cir. 1984).

JURISDICTIONAL STATEMENT

Pursuant to Section 1254(1) of Title 28 of the United States Code, this Court has jurisdiction to review the decision of the Fourth Circuit in this matter dated and entered February 28, 1984.

STATUTES INVOLVED

The pertinent statutes are 29 U.S.C. §§ 621, 623, 626 (1975); 29 U.S.C. § 216 (1965); and Rule 52 of the Federal Rules of Civil Procedure. The text of these statutes in relevant part is provided in the Appendix.

STATEMENT OF CASE

This is the second time this case has come before this Court. The factual background is as follows:

On August 22, 1977, Smallwood applied to United for a position as a pilot/flight engineer. (9/20/82 Trans., p. 63). At that time, he was 48 years old. (Plaintiff's Exhibit No. 1, 1st Trial). After reviewing his application, United rejected Smallwood's application because he was over 35 years of age. United's policy at the time was not even to consider applicants over 30 years old. (8/24/77 Letter to Smallwood, Plaintiff's Exhibit No. 2, 1st Trial). United did not interview Smallwood, investigate any of his credentials, or verify any of the information on his application. (9/20/82 Trans., pp. 40-41, 46-48). Smallwood filed a notice of intent to sue with the Labor Department and thereafter filed suit against United for violation of the Age Discrimination in Employment Act (ADEA) pursuant to 28 U.S.C. § 1331(a) (1977). (3/24/78 Letter to Department of Labor). United answered and ultimately raised as its only defense that its hiring policy was a bona fide occupational qualification (BFOQ). Both parties conducted discovery. Despite its original denial of Smallwood's qualifications, United abandoned this denial by objecting, both at the pretrial conference and at the original trial, to Smallwood's proffered exhibits regarding his qualifications, stating that such evidence was irrelevant to the issues for trial. (11/28/79 Trans., p. 23; Objection to Plaintiff's Exhibits for Trial, Docket No. 45). At the original trial, United stipulated to Smallwood's prima facie case of liability and damages. (11/28/79 Trans., pp. 3-4, 7-8). United then presented evidence on its BFOQ defense and

its evidence that Smallwood would not have been hired for the job even absent discrimination. (11/28/79 Trans., pp. 102-03). This "wouldn't have hired anyway" defense was raised for the first time at trial. (11/28/79 Trans., p. 109).

After hearing the evidence, the District Court ruled that United had established a BFOQ and dismissed the case. Because of its BFOQ ruling, the District Court did not reach the "wouldn't have hired anyway" defense raised by United. *See, Smallwoood v. United Air Lines, Inc.*, 661 F.2d 303, 306, n.3 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982). Smallwood appealed the District Court's decision and the Fourth Circuit reversed. *Id.* The matter was remanded for further proceedings in the District Court. *Id.* United's Petition for a Writ of Certiorari to this Court was denied. *Id.*

On remand, at the pretrial conference, it became apparent that United intended to submit additional evidence on its "wouldn't have hired anyway" defense. Accordingly, Smallwood filed a Motion for Clarification of Issues on Remand, contending that no further evidence should be allowed as the record on that issue was closed in the original trial, and no adequate grounds existed to reopen the record. The District Court rejected Smallwood's position and allowed United to reopen the record and present additional evidence on its "wouldn't have hired anyway" defense. (9/10/82 Trans., pp. 11-17).

At the September 20, 1982, hearing (the "second trial"), the parties stipulated to Smallwood's evidence that he was still qualified for the job and to damage evidence. (9/20/82 Trans., pp. 4-10). United then put on its additional evidence regarding the "wouldn't have hired anyway" defense. This evidence consisted of supplementing the earlier record regarding Smallwood's employment history with his former employer, Overseas International Airlines ("ONA"), and did not involve any issue of medical, psychological or job qualifications aris-

ing subsequent to the original hearing. United presented additional evidence on its theory that Smallwood would not have been hired, if it had processed his application, because he had allegedly defrauded his former employer, ONA, and misrepresented his employment status with ONA on his application. The evidence, as admitted by United's own witness, showed that Smallwood was *not* terminated by ONA but was still an employee at the time of his application. (*See, e.g.*, 9/20/82 Trans., p. 46). After all the evidence was submitted, the District Court rejected United's "wouldn't have hired anyway" defense and awarded Smallwood judgment, including damages, liquidated damages, costs, attorneys' fees, and injunctive relief ordering United to process Smallwood's application as it would have any other applicant's in August 1977.[1]

From these decisions of the District Court on remand, both parties noted appeals. United appealed the District Court's award of damages and injunctive relief as procedurally incorrect and clearly erroneous based upon the evidence presented at the second hearing. Smallwood cross-appealed the reopening of the record, and the District Court's failure to (1) include pension benefits in the liquidated damage award, (2) award all costs incurred and (3) award Smallwood damages from the time the first flight officer was hired following the discriminatory act. The Fourth Circuit dismissed Smallwood's cross-appeal without discussion, and reversed the District Court's judgment for Smallwood as clearly erroneous.

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[1] This was the injunctive relief Smallwood requested. He at no time sought court-ordered employment with United but only a fair consideration of his application for employment.

ARGUMENT

This Petition presents the Court with an opportunity to settle several important questions, substantive and procedural, which have arisen as the lower courts have interpreted and applied the Age Discrimination in Employment Act. In addition, it calls for this Court to exercise its supervisory powers in reviewing the Fourth Circuit's reversal of the District Court's findings for the Plaintiff as clearly erroneous.

I. IN ORDER TO RESOLVE ISSUES REMAINING ON REMAND, WHEN MAY THE DISTRICT COURT REOPEN THE RECORD AND TAKE ADDITIONAL EVIDENCE WHEN THE COURT OF APPEALS DID NOT SO DIRECT AND EVIDENCE ON THE ISSUES WAS PRESENTED AT THE ORIGINAL TRIAL?

In reaching its decision for United, the Fourth Circuit summarily dismissed Smallwood's appeal of the reopening of the record, used the additional evidence as the basis for its opinion against Smallwood and misconstrued the District Court's proceedings to justify its opinion. A brief review of the proceedings below illustrates one of the procedural questions this case presents, the resolution of which will guide all district courts faced with a remand and no directions from the courts of appeal, as well as illustrating the liberties the Fourth Circuit took with the record in order to justify the result it reached.

At the original hearing of this case, both parties presented evidence on liability and damage questions. United specifically put on evidence as to its BFOQ defense and as to its position that even if it had not discriminated against Smallwood, it would not have hired him. (11/28/79 Trans., pp. 101-11, 118-22). The District Court ruled that United had established its BFOQ defense and, therefore, did not reach United's "wouldn't have hired anyway" defense. On appeal, the Fourth Circuit reversed the District Court's BFOQ decision as clearly erroneous

and, noting that the "wouldn't have hired anyway" issue was not resolved at trial "remanded for action consistent with this opinion." *Smallwood v. United Air Lines, Inc.*, 661 F.2d 303, 309 (4th Cir. 1981). If the District Court had not erred in its BFOQ decision, the damage questions would have been resolved at the original trial.

On remand, when it became obvious from United's discovery requests that it intended to submit additional evidence on the "wouldn't have hired anyway" defense, Smallwood filed a motion for clarification of the issues on remand. In ruling against Smallwood, the trial court decided to reopen the record and allow United to put on additional evidence so that

> if [the case] goes to the Court of Appeals another time, it will be in a position that they can decide it and not send it back here for any more testimony.

(9/10/82 Trans., p. 16).

The trial court made this decision despite the fact that it was

> just not sure that there is any more that [United] ha[s] now that [it] didn't have and couldn't have had at the first trial.

Id. p. 10.

The Fourth Circuit based its reversal of the District Court's judgment for Smallwood on the evidence that was admitted as a result of the District Court's decision to reopen. "Finding no merit" in Smallwood's appeal of this decision, the Fourth Circuit dismissed it with no discussion.

The effect of this decision is to allow, in fact approve of, a trial court reopening the record for additional evidence after every remand in order to make a "better" record for the entry of a final order at the appellate level on the next series of appeals, regardless of the justice to the parties in doing so. Such a proceeding is so far from the accepted and usual course of proceedings as to

call for the exercise of the Court's supervisory function. If left undisturbed, this precedent will undoubtedly result in court dockets being further backlogged. It also penalizes plaintiffs like Smallwood who, but for the error of the district court at the original trial, should have their case decided on the record established at the first trial. United agrees there is a lack of guidance on this issue, stating that reopening is governed only by the discretion of the trial court. (United's Reply Brief to Fourth Circuit p. 23). Thus, this case presents the opportunity to establish the standards for the proper reopening of the record on remand, other than to prepare a "better" record for appeal.

This case presents a good procedural background to establish the standard. Because evidence on the "wouldn't have hired anyway" defense was presented at the first trial, on remand the District Court was certainly able to decide the issue on the existing record. For the reasons stated above, it did not do so. Therefore, an unnecessary hearing on this issue was required, and as a result of that new evidence, the District Court's decision for Smallwood was reversed on appeal as clearly erroneous.

Not only did the Fourth Circuit dismiss Smallwood's cross-appeal, but the Fourth Circuit misconstrued the trial court's actions as allowing two hearings on a bifurcation of violation and remedies issues.

> The district judge made it clear throughout the first trial in this case that he was considering only the violation issue. Thus, he repeatedly—ultimately, with considerable emphasis and finality—ruled that he would not permit the defendant to inquire either on cross-examination of the plaintiff or by direct evidence fully into the [basis of the wouldn't have hired anyway defense]. He in effect by these rulings bifurcated the two issues in this case.

728 F.2d 614, 619. This statement is made despite the parties stipulation as to damages at the first trial (11/

28/79 Trans., pp. 3, 7-8). Far from bifurcating the proceedings, the District Court at the first trial made it clear that damages were the only issue to which the evidence was relevant and that any restraints on United's presentation were due to evidentiary rulings on the way in which it was presented. A review of the transcripts shows the Appellate Court's misconstruction of the District Court proceedings. (*See*, for example, 11/28/79 Trans., pp. 3-4, 101-11, 119-22, 213-14; 9/10/82 Trans., pp. 5-10). This record clearly calls for an exercise of this Court's supervisory function.

Thus, the first issue in this case presents the Court with opportunity not only to settle the question as to when a district court may reopen the record on remand for additional evidence but also to review the Fourth Circuit's action in this case.

II. DOES THE SEPARATION OF LIABILITY AND DAMAGE ISSUES, ESTABLISHED IN THE CONSTITUTIONAL CASE OF *MT. HEALTHY SCHOOL BOARD OF EDUCATION v. DOYLE*, 429 U.S. 274 (1977), APPLY IN ADEA CASES?

Although neither the parties nor the District Court relied upon or even mentioned *Mt. Healthy School Board of Education v. Doyle*, 429 U.S. 274 (1977), the Fourth Circuit relied upon the decision heavily in reversing the judgment for Smallwood. The Fourth Circuit stated:

> This distinction between the two issues [of liability and damages], involving as they do separate and distinct . . . facts, was initially explicated in connection with a constitutional claim in *Mt. Healthy*, [citations omitted] and was later specifically applied in the employment discrimination context in the companion cases of *Teamsters v. United States*, 431 U.S. 324, 326 [sic] 97 S.Ct. 1843, 1850, 52 L.Ed.2d 396 (1977), and *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395, 403-04 n.9, 52 L.Ed.2d 453 (1977).

728 F.2d 614, 618. The Fourth Circuit then determined that although Smallwood was denied a position with United solely because of his age, he was not entitled to damages because he, in the opinion of the Fourth Circuit, would not have been hired even if he were not the victim of discrimination. In its broad-brush application of *Mt. Healthy*, the Fourth Circuit takes no note of this Court's careful demarcation of *Mt. Healthy* as a constitutional standard nor the procedural contexts of this Court's decisions in *Teamsters* and *Rodriguez*.

Since the decision in *Mt. Healthy*, this Court has consistently referred to the decision as a constitutional one. *See, e.g., Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270 n.21 (1977); *Codd v. Velger*, 429 U.S. 624, 630 (1977) (Brennan, J., dissenting); *Carey v. Piphus*, 435 U.S. 247, 260 (1978); *Duren v. Missouri*, 439 U.S. 357, 368 n.26 (1979); *Columbus Board of Education v. Penick*, 443 U.S. 449, 465 n.13 (1979); *NLRB v. Transportation Management Corp.*, —— U.S. ——, 76 L.Ed.2d 667, 676, 103 S.Ct. 2469, ———— (1983).

Despite the Fourth Circuit's opinion, it does not appear that this Court has specifically applied the *Mt. Healthy* standard to the employment discrimination statutes. In the cases cited by the Fourth Circuit, *Mt. Healthy* is mentioned in dicta in a footnote in *Rodriguez* and not mentioned at all in *Teamsters*. In neither of these class action suits was application of the *Mt. Healthy* actually at issue.

In *Rodriguez*, the Court's opinion dealt primarily with the court of appeals' class certification. As none of the class representatives had " 'suffer[ed] the same injury' as the class members," 431 U.S. at 403 (quoting *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216 (1974)) a class action prerequisite was not met and, thus, certification was not improper. The representatives

were not injured because they could not make the prima facie showing that they were qualified for the job. Lacking job qualifications, no determination of discrimination was made.

In dicta, this Court stated:

> Even assuming, arguendo, that the company's failure even to consider the applications was discriminatory, the company was entitled to prove at trial that the respondents had not been injured because they were not qualified and would not have been hired in any event. See, e.g., Teamsters v. United States, ante, at 369 n.53. . . . Cf. Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274, 285-87. . . .

Id. at 403 n.9.

Clearly, this dicta does not constitute specific application of the *Mt. Healthy* standard. At best, it establishes a class action procedure. In a class action, this procedure is necessary since a determination of a discriminatory practice raises only a presumption or inference of individual class members' entitlement to relief. At an individual relief or "damage" hearing, the individual "bear[s] the burden of coming forward with the basic information about his qualifications. . . . [T]he burden will then be on the employer to show [the individual] was nevertheless not a victim of discrimination." *Teamsters*, 431 U.S. at 369 n.53.

Such a procedure makes no sense in a non-class action like Smallwood's. Smallwood established his qualifications at trial and United did not refute or rebut them. There was a clear finding of liability. Thus, the rationale in the dicta in *Rodriguez* does not apply to Smallwood. If it is analogous to any case citing *Mt. Healthy*, Smallwood's case is most closely analogous to Bakke's in *Regents of the University of California v. Bakke*, 438 U.S. 265, 320 n.54 (1978).

The procedural dissimilarity with *Teamsters* is equally striking. In *Teamsters*, the primary issue was the bona fide seniority system exemption from Title VII liability. Again, in a class action context, the employer's "liability", 431 U.S. at 360, had already been established, creating an inference that any employment decision made during the time the discriminatory policy was in effect was made pursuant to that policy. At the individual damage hearings, the burden was then "on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons." *Id.* at 362. As with *Rodriguez*, *Teamsters* is not a specific application of the *Mt. Healthy* standard and the application of the *Teamsters* rationale makes no sense in the context of Smallwood's case.

Thus, it does not appear that this Court has applied the *Mt. Healthy* standard to the employment statutes. Accordingly, the Fourth Circuit's application of *Mt. Healthy* to the ADEA to defeat a damage award to a victim of age discrimination decides an important question of federal law which has not been, but should be, settled by this Court. The Court should grant Smallwood's Petition for Writ of Certiorari to settle this question.

III. DID THE FOURTH CIRCUIT MISCONSTRUE THE RECORD TO JUSTIFY ITS DECISION THAT THE DISTRICT COURT'S "CONCLUSIONS" WERE CLEARLY ERRONEOUS?

Rule 52 of the Federal Rules of Civil Procedure provides that

> [f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

See also, United States v. United States Gypsum Co., 333 U.S. 364 (1948). Despite this clear standard, the Fourth Circuit went out of its way to construe the record in

such a manner as to ignore totally the evidence that supported the District Court's decision for Smallwood. A review of the record shows that the Fourth Circuit substituted its judgment for that of the District Court. Thus, there is the need for this Court to exercise its supervisory powers over the Fourth Circuit's activity.

At the first trial, in attempting to show that Smallwood would not have been hired, United introduced the testimony of J. D. Smith. In response to United's questioning, Smith stated:

> A. If we were advised that an arbitration decision supported *a defrauding activity*, that would have terminated the processing of the individual.
>
> Q. What effect does *falsification of an application* have upon the hire process at United?
>
> A. The same process that terminated the interview or the screening process. That's spelled out in our program.

(11/28/79 Trans., p. 122) (emphasis added).

United did not establish that Smith was on the board which makes employment decisions for United. Moreover, United's evidence did not establish an arbitration decision [2] supporting fraud by Smallwood nor any falsification of his employment application. (*See* 11/28/79 Trans., pp. 100-11). This is the state of the evidence at the original trial. On this record, the District Court's ruling in rejecting the "wouldn't have hired anyway" defense is clearly correct.

At the second trial, September 20, 1982, the District Court heard United's witness, Volz, testify to the fact that not only was it United's policy not to hire applicants who allegedly misrepresented facts on their employment

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[2] The arbitration decision and Referee's opinion did not even exist at the time United rejected Smallwood's application. They did exist at the time of the first trial, but were not offered into evidence by United.

application and attempted to defraud previous employers (9/20/82 Trans., pp. 43-44), but also that (1) the decision not to hire for these reasons was made by United's personnel department or hiring board, not Volz alone (9/20/82 Trans., pp. 13-14); (2) United never processed Smallwood's application to the point of discovering these alleged deficiencies before deciding not to hire him; although if United had processed the application, it certainly would have discovered the alleged deficiencies (9/20/82 Trans., pp. 21, 41-42, 51-52);[3] (3) that other applicants cited by United as establishing the aforementioned policies were interviewed by United (United's Opening Brief to the Fourth Circuit, p. 14) and were given an opportunity to discuss any of United's concerns; (4) Smallwood was not given such an opportunity to discuss these matters with United (9/20/82 Trans., pp. 47-48); and (5) Smallwood was in fact an employee of ONA at the time of his application to United (9/20/82 Trans., p. 46). Thus, United's evidence on this point is not as clear as the Fourth Circuit's opinion indicates.

Added to this is Smallwood's rebuttal testimony that no fraudulent activities or misrepresentations existed. In regard to the alleged application misrepresentation, counsel for United asked Smallwood on cross examination:

> Q. Well, you weren't flying for Overseas National Air Lines, were you? You had been discharged? The company had taken actions to discharge you, had they not?
>
> A. They had taken—sent me a letter to say that my services were terminated, that is correct.
>
> Q. Did you bring that to the attention of United Air Lines in any fashion?
>
> A. No. I felt the way I filled out my application would be the most objective and honest way to do it.

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[3] Although United's testimony was unqualified in this area, it should be noted that in the two years between Smallwood's application and the original trial, United did not obtain the evidence involved.

> I gave the name and address of my present employer, which I know that every airline or every employer is going to check with. They will check with them. They will find out what ONA says. They will call me, and then find out what I say. And between that development I believe that United would have hired me. There are a lot of reasons for that ONA's action that did not appear in the decision of the board.

(9/20/82 Trans., pp. 72-73). It was precisely this testimony that the District Court found convincing, stating:

> Had there been an absence of the discriminatory rejection because of age, then a suitable inquiry would have been made as to whether or not this plaintiff was an employee, whether or not his activity with his former employer was such that it would warrant the defendant from rejecting him as an applicant. As I say, that inquiry has been foreclosed by what has now been determined to be a discriminatory act on the part of the defendant.
>
> It seems to me the stating that he was an employee is robbed of some of its sinister character by the fact that his former employer was listed. It was reasonable to assume that his prospective employer, United, would contact his former employer, where that former employer would give its view of whether he was still an employee, what were the circumstances under which he was terminated, if he was actually terminated, and then, as did happen in all of the other instances in which terminations or refusal to continue with the processing of applications, the applicant himself would have been either interviewed routinely or some conversation with him had so that he could have had at least have given his side of the story. That was not done here.

(9/20/82 Trans., pp. 98-99).

It was the District Court who heard the testimony of Volz and Smallwood and could weigh their credibility and observe their demeanor. The fact that the District

Court found Smallwood more convincing than Volz is not grounds for reversing its judgment.

Moreover, it must be noted that the documentary evidence supports the District Court's decision. Under the collective bargaining agreement between the Air Line Pilots Association and ONA, "employee" is defined as "a pilot whose name appears on the pilot's seniority list . . . ." (9/20/82 Trans., p. 59). Smallwood's name was, or should have been, on that list. (9/20/82 Trans., pp. 66-67). There is also nothing in the Grievance Procedure section of that contract which indicates that a pilot pursuing a grievance is no longer an employee. Rather, a pilot in a grievance proceeding is merely "held out of service" but continued on the payroll. (Section 21(A)(2), ONA Collective Bargaining Agreement, Plaintiff's Rebuttal, Second Trial). Also, Smallwood asked the attorney who represented him in the ONA grievance procedure what his status was with ONA during the pendency of that procedure and was told "You're an employee." (9/20/82 Trans., p. 60). Finally, during the pendency of the procedures, Smallwood regularly received mail from ONA and the Air Line Pilots Association (ALPA), including mail addressed to "All Employees," "All ONA Pilots" and the like. (Plaintiff's Rebuttal Exhibits, Second Trial). Clearly, Smallwood in good faith thought he was still an employee, and, it is submitted, was in fact an "employee" and so regarded by ONA. In fact, United's witness admitted that Smallwood was an employee at the time of his application. (9/20/82 Trans., p. 46). Thus, there can be no "misrepresentation".

Smallwood's evidence is more than sufficient to justify the District Court's ruling. As the District Court stated in ruling on United's Motion for Clarification following the second trial, "[t]he court's feelings at the time it ruled, as well as now, are that the after-the-fact rationale and testimony of the defendant in this regard, particularly where no opportunity had been given the plaintiff

to explain prior transactions with his former employer, were just not persuasive." (App. p. 83).

As the District Court was entitled to judge the credibility of witnesses, weigh the evidence and to be skeptical of United's post-event rationalization for not hiring Smallwood, *Cova v. Coca Cola Bottling Co. of St. Louis, Inc.*, 574 F.2d 958, 961 (8th Cir. 1978); *Hodgson v. First Fed. Sav. & Loan Ass'n. of Broward Co., Fla.*, 455 F.2d 818, 824 (5th Cir. 1972) and as its findings were supported by Smallwood's testimony and documentary evidence, the District Court's rulings were not clearly erroneous and, therefore, are not subject to reversal.

Despite this evidentiary basis for the District Court's decision, the Fourth Circuit ignored all of the evidence supporting Smallwood and devoted ten pages of its opinion to reciting events that occurred with Smallwood and ONA, before Smallwood ever applied to United. The Fourth Circuit referred to Smallwood's "discharge" by his former employer (ONA) and quoted the "discharge" letter. This was done even though the evidence was clear that, as a result of the Board of Adjustment decision, Smallwood was not discharged, but remained an employee. (Decision of the Board, Defendant's Exhibit No. 1, Second Trial). The Fourth Circuit engaged in a detailed review of the opinion of the Referee in the arbitration between ONA and Smallwood. This is simply the opinion of one man, and not the decision itself. The Fourth Circuit quotes, not the Referee's opinion itself, but the Referee's *summary* of ONA's argument against Smallwood. 728 F.2d at 622. This argument is established as "fact" by the Fourth Circuit. *Id.* However, the Referee's summary of Smallwood's argument is treated as merely "assert[ions]." *Id.* Clearly, the Fourth Circuit is not only putting itself in the trial court's role of judging the credibility of witnesses and finding fact, but is misconstruing the evidence as well.

The Fourth Circuit's review of the arbitration proceeding is so detailed that one loses sight of the fact that it

is Smallwood's suit against United, not Smallwood's grievance against ONA, which is on appeal. Reading the Fourth Circuit's opinion, it appears that the Fourth Circuit was so offended by the contents of the Referee's opinion that it completely overlooked the question at hand, namely, were the District Court's findings clearly erroneous? The Fourth Circuit apparently reached the decision it wanted to reach, despite the evidence and standards of review. The Fourth Circuit did not mention any of the evidence, cited above, which supported the District Court's decision. In short, the Fourth Circuit did precisely what the District Court repeatedly refused to do at the first hearing—it tried whether or not Smallwood was rightfully discharged by ONA. This was not the issue before the District Court, nor the Court of Appeals. The question presented was, given the fact of the arbitration decision (not whether or not that decision was correct), would United refuse Smallwood's employment absent discrimination. For the reasons stated above, the District Court was not convinced such would have been the case. That decision was not properly subject to reversal because there was evidence to support it.

The Fourth Circuit, ignoring the evidence supporting the District Court's decision, and emphasizing United's evidence, apparently reached the decision it wanted to reach. As has been fully briefed in the Petition for a Writ of Certiorari in *Phyllis A. Anderson v. City of Bessemer, City, etc.*, 717 F.2d 149 (4th Cir. 1983), *cert. pet. pend.*, No. 83-1623, the Fourth Circuit's action in this case appears to be consistent with its apparent pattern of *de novo* review and reversal of district court decisions in favor of plaintiffs in employment discrimination cases. This calls for the exercise of this Court's supervisory function to, at a minimum, investigate this pattern so as to prevent undermining the principles and policies of fair employment opportunities mandated by federal statutes.

IV. EVEN IF DISTRICT COURT'S "CONCLUSIONS" WERE CLEARLY ERRONEOUS, SHOULD SMALLWOOD, NEVERTHELESS, BE AWARDED BACK PAY FROM THE TIME OF THE DISCRIMINATION THROUGH THE SECOND TRIAL AS ALLOWED UNDER SIMILAR CIRCUMSTANCES BY THE THIRD CIRCUIT IN *RODRIGUEZ v. TAYLOR*, 569 F.2d 1231 (1977), AND THE EIGHTH CIRCUIT IN *HOUGHTON v. McDONNELL DOUGLAS CORP.*, 627 F.2d 858 (1980)?

Smallwood's case presents the substantive question as to when back pay can and should be awarded a plaintiff who although a victim of employment discrimination, ultimately is found not to be qualified for the job. The Third Circuit in *Rodriguez v. Taylor*, 569 F.2d 1231, (1977), *cert. denied*, 436 U.S. 913 (1978), and the Eighth Circuit in *Houghton v. McDonnell Douglas Corp.*, 627 F.2d 858 (1980) have ruled that a plaintiff, otherwise unqualified, may recover back pay under certain circumstances. By misconstruing the record, the Fourth Circuit avoided deciding the issue directly. Dicta in its opinion, however, indicates that the Fourth Circuit finds such a rule "untenable."

In *Rodriguez*, the City of Philadelphia had rejected Rodriguez's application for a Security Officer I position due to his age. Rodriguez filed suit on behalf of himself and all persons over 41 in the Eastern District of Pennsylvania. After a bench trial, the District Court enjoined the City from use of its age limitation as to the entire class. In addition, it ordered the City to give Rodriguez the employment test. If he passed, he was to be hired with full retroactive benefits. The court further ordered that whether or not Rodriguez passed the exam, he was entitled to back pay from the date the first applicant was hired subsequent to the discrimination and the date the final order was entered. Liquidated damages and attorneys' fees were also awarded.

The City appealed to the Third Circuit. Pending the appeal, Rodriguez was administered and failed the employment test. Rejecting the City's argument that the back pay award was erroneous since Rodriguez was not "qualified" for the job, the Third Circuit affirmed the back pay award. Two factors predominate in the court's opinion: (1) one of the goals of a back pay award is to deter employers from discriminating in employment decisions, and (2) the City failed to come forward with evidence of Rodriguez's disqualification at trial. Both of these factors are present in Smallwood's case as well.

United admittedly refused to consider for employment any applicant over 35 years of age. Such practice was found not to be a BFOQ. It is precisely this type of knee-jerk reaction to age that the ADEA was enacted to deter. As stated by the Third Circuit:

> The Age Discrimination in Employment Act of 1967 was enacted to ensure that employers base their hiring decisions on expectations of individuals' job performance rather than on unwarranted irrebuttable presumptions that all persons of a certain age less than 65[4] would be unable to satisfactorily perform a given job.

Id. at 1236. *See also* 29 U.S.C. § 621(a)(2),(b) (1975). United's 35-year rule totally frustrated this policy. This willful frustration occurred despite the easy method available to United to comply with the most basic of equal employment principles—it had only to process fairly Smallwood's application as it would have processed any 34-year old's application. Had it done so, any disqualifying factors would have been discovered contemporaneously with the employment decision and the purpose of the ADEA fulfilled. United's and other employer's frustration of the ADEA should be deterred by an

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[4] The ADEA was subsequently amended to protect individuals aged 40 through 70 years. 29 U.S.C. § 631(a) (1978).

award of back pay. This Petition gives the Court an opportunity to effectuate the deterrance policy created by an award of back pay.

A contemporaneous examination of an applicant's job qualifications serves another valuable purpose—the employer is prepared to meet its burden *at trial* on the issue of whether or not the plaintiff would have been hired for the job but for the discrimination. The City of *Rodriguez* failed to meet its burden and the trial court awarded back pay, in part, because of it. United failed to meet its burden at the first trial and should also be obligated for back pay because of it.

Although United knew of Smallwood's grievance procedure with ONA before the first trial (*see, e.g.*, Smallwood 8/24/79 Deposition, pp. 23, 27-28), it failed to obtain a copy of that decision before trial. It was this failure that was the basis of the District Court's evidentiary rulings at the first trial—the rulings used by the Fourth Circuit to hold that the case was bifurcated. By failing to process Smallwood's employment application and failing to prepare properly its case for trial, United failed to meet its burden at the first trial. (Even with its supplemental evidence, the District Court still found United had failed to meet its burden.) When a defendant, whose liability in an employment discrimination case is clear, fails to meet this burden at trial, it should be obligated to pay back pay from the time of the discrimination until the final order is entered. This back pay should be awarded even when later-developed evidence shows the existence of a non-discriminatory basis which, if known at the time, would justify the defendant's failure to hire plaintiff. Any other rule rewards the defendant's discrimination and inadequate trial preparation by allowing it to defeat a back pay award by reopening the record to present or supplement evidence. This Petition presents the Court with the opportunity to prevent this dilatory, inadequate trial preparation which

frustrates the goal of finality in litigation and backlogs the court's dockets, as well as fulfilling the deterrence goal of the ADEA.

In *Houghton v. McDonnell Douglas Corp.*, 627 F.2d 858 (8th Cir. 1980), the Eighth Circuit also awarded an ADEA plaintiff back pay although the trial court had determined that the plaintiff was medically disqualified for the three years from the discriminatory act until the final order was entered. At the original trial, McDonnell Douglas attempted to defend as a BFOQ its age-based decision to remove Houghton from his test pilot status. The trial court's decision for Houghton was reversed by the Eighth Circuit and remanded to the trial court for a determination of Houghton's then physical ability to resume test pilot responsibilities. If he was not presently qualified, the trial court was to determine the time of disqualification and award damages accordingly. The Eighth Circuit made this ruling in February 1975 when Houghton was 55 years and 4 months old. On remand, the trial court found that Houghton was medically disqualified at age 52, the time when McDonnell Douglas has removed him from test pilot status. Finding him disqualified on a factor other than age, the trial court denied back pay. On appeal, the Eighth Circuit reversed and granted back pay from the time of discrimination until the commencement of the first trial. Similar to *Rodriguez*, the foundation of the opinion appears to be (1) the discriminatory removal of plaintiff based solely on age, and (2) the defendant's failure to present sufficient evidence at the first trial.

Again, Smallwood fits into this decision. By creating the fiction that the trial court bifurcated the liability and damage issues in this case, the Fourth Circuit avoided a decision contrary to the rule established in two other circuits. However, there can be no doubt that the result reached in this case puts the Fourth Circuit in conflict with two other circuits on this important sub-

stantive question in age discrimination cases. This situation calls upon this Court to exercise its discretion and grant this Petition to resolve this issue of back pay to a job applicant who has been the victim of employment discrimination.

V. WHEN A DEFENDANT HAS WILLFULLY VIOLATED THE ADEA, MAY IT AVOID A DAMAGE AWARD BY ATTEMPTING TO PROVE THAT THE PLAINTIFF DOES NOT MEET CERTAIN SUBJECTIVE AND NON-JOB-RELATED CRITERIA?

United's defense to damages is that Smallwood's employment history with ONA allegedly establishes dishonesty and that, therefore, he would not have been hired in any event. Since he was not "qualified" for the position, he was not damaged by United's discrimination. This case presents the substantive question as to whether or not the factor asserted by an ADEA defendant, once liability has been established, to defeat a damage award, must be an objective, job-related factor. This question is particularly important where, as here, the factor was not discovered or asserted until years after the employment decision was made.

Related questions are whether or not honesty or integrity is an objective, job-related factor and whether or not a trial court can and should be skeptical of non-objective, non-job-related factors asserted after the fact.

In ruling on Smallwood's argument, the Fourth Circuit seems to agree that the factor asserted must be job-related. 728 F.2d at 625-26. In so ruling, the Fourth Circuit seems to be in accord with other jurisdictions which have ruled on the question. *Murnane v. American Air Lines*, 667 F.2d 93, 102 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982); *EEOC v. Goodyear Tire & Rubber Co.*, 22 F.E.P. 786, 787 (W.D. Tenn. 1980). *See also, East Texas Motor Freight System Inc. v. Rodriguez*, 431 U.S. 395, 400 (1977); *Rodriguez v. Taylor*,

569 F.2d 1231 (3rd Cir. 1977). However, the opinion goes on to state that honesty is so job-related that the alleged lack of it defeats Smallwood's entitlement to damages. The argument is so expansive as to eliminate job-relatedness as a necessary element in the damage defense. According to the Fourth Circuit:

> What the plaintiff contends[5] is that trustworthiness, reliability and honesty are in no way required or expected of a pilot of a large commercial plane, to whose substantially unsupervised competency, trustworthiness, reliability, and fidelity to the rules and regulations is committed the safety of the scores of passengers on the plane he pilots. We are unwilling to accept this argument. The logs a pilot maintains, the accuracy of his reports, the faithful and exacting observance of all safety rules and regulations and their accurate and punctual recording, all are vital to the safety of the plane's passengers and all depend on the trustworthiness, truthfulness and reliability of that pilot aloft, where he operates largely free from any effective supervision. Any argument that the only qualification of such a flight officer is his mechanical ability to manipulate the various controls of the plane completely lacks conviction.

728 F.2d at 625.

This same argument applies with equal force to virtually any job—truck driver, postman, waiter, mechanic, police officer, child care provider, etc. In fact, honesty

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[5] Smallwood *never* argued that integrity or honesty are not important characteristics for air line pilots, despite this language from the Fourth Circuit. What Smallwood argued was that in a case like this, where liability is established, a defense to damages should not be established on the basis of subjective, non-job related criteria. In addition, the Fourth Circuit assails Smallwood for not attempting to rebut the Referee's opinion. In as much as the District Court made clear that it was not trying the merits of the ONA grievance, Smallwood had no reason to introduce the evidence on his behalf.

is the basic criteria upon which any relationship, employment or social, is based. Precisely because honesty is the universal base of any relationship, holding that the alleged lack of perfect honesty is a defense to damages in employment cases erases job-relatedness as a requirement to a defense to a damage award.

This case presents a solid record upon which to decide these issues. Smallwood's flight records, including required filings and safety proceedings, are impeccable. There is no evidence that he has ever in any way endangered the safety of himself, co-workers, or passengers. To the contrary, Smallwood has been awarded military decorations for his flying, including the Distinguished Flying Cross and the Air Medal with three oak-leaf clusters. The questions raised by United about Smallwood do not at all involve safety and ability to function as a flight officer. Thus, the question presented by this record is, in light of violation of ADEA, can an employer escape a damage award merely by asserting that the plaintiff would never have been hired in any event due to the lack of a subjective criteria? And if so, is honesty such a criteria? These issues are presented to the district courts every time an employment discrimination case is tried. This Petition, if granted and decided, will provide the district courts with a clear legal framework upon which to resolve these issues.

Related to this question is whether or not the finder of fact can and should be skeptical of any alleged disqualifying factors asserted by a defendant, who has been found to have discriminated unlawfully. In this case, Smallwood was rejected solely because of his age. More than two years after this decision, and the day before trial, United allegedly "discovered" [6] Smallwood's griev-

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[6] See 11/28/79 Trans., p. 109. But see also Smallwood 8/24/79 Deposition, pp. 23, 27-28.

ance procedure with ONA and asserted that this would have prevented United from hiring him even if it had not discriminated against him. At the conclusion of the second trial, the District court ruled:

> it seems to me the Court is entitled to be, and should be, skeptical of after-the-fact decisions as to what the defendant would have done had it known what it knows now.

(9/20/82 Trans. p. 98). *See also* App. p. 89.

The District Court's skepticism was supported by decsisions in other circuits. *Hodgson v. First Federal Savings & Loan Ass'n of Broward Co.*, 455 F.2d 818, 824-25 (5th Cir. 1972); *Cova v. Coca Cola Bottling Co. of St. Louis, Inc.*, 574 F.2d 958, 961 (8th Cir. 1978); *EEOC. v. Goodyear Tire & Rubber Co.*, 22 F.E.P. 786, 787 (W.D. Tenn. 1980).

In reviewing the District Court's decision, the Fourth Circuit ruled directly contrary to the circuits cited above, stating:

> The idea that the defense, based as it was on undisputed facts, should be dismissed or burdened with a heavy cloak of skepticism because it was an "after-the-fact rationale" is a reason that is completely contrary to the bellwether case in this area of *Mt. Healthy.*

728 F.2d at 623. The Fourth Circuit takes no note of the fact that the defendant in *Mt. Healthy* based its employment decision as to the plaintiff on two factors; one discriminatory, the other legitimate. Thus, *Mt Healthy* is factually very different from Smallwood's case where the employment decision was based solely on discriminatory factors. Accordingly, this case raises questions as to the proper interpretation of *Mt. Healthy* and puts the Fourth Circuit in conflict with two other circuits on this issue.

VI. DID THE FOURTH CIRCUIT ERR IN DENYING SMALLWOOD'S CROSS-APPEAL?

For the reasons stated above, the Fourth Circuit erred in reversing the District Court's decision for Smallwood. Thus, it also erred in denying, without consideration, Smallwood's cross-appeal. This Court should remand for consideration of the merits of Smallwood's cross-appeal.

CONCLUSION

For the reasons presented above, a Writ of Certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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FILED
MAY 25 1984
ALEXANDER L. STEVAS
CLERK

83-2058

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

GERALD E. SMALLWOOD,

Petitioner,

v.

UNITED AIR LINES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

AMENDED APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-2115

Gerald E. Smallwood, Appellee,

-versus-

United Air Lines, Inc., Appellant.

No. 82-2116

Gerald E. Smallwood, Appellant,

-versus-

United Air Lines, Inc., Appellee.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge. (C/A 79-446)

Argued: November 1, 1983.
Decided: February 28, 1984

Before RUSSELL, HALL and MURNAGHAN, Circuit Judges.

Herbert Prashker (William E. Hickman, Poletti, Freidin, Prashker & Gartner on brief) for Appellant in No. 82-2115, and for Appellee in No. 82-2116; Wyatt B. Durrette, Jr. (Michael C. Montavon, Joyce A. Naumann, Roeder, Durrette & Davenport, P.C. on brief) for Appellee in No. 82-2115 and for Appellant in No. 82-2116.

RUSSELL, CIRCUIT JUDGE:

This is an action under the Age Discrimination in [sic] Employment Act (ADEA)[1] in which the plaintiff (Smallwood) challenges the refusal of the defendant United Air Lines, Inc. (United) to process his application for employment as a flight officer under a rule providing that an application for employment as a flight officer would not be processed if the applicant were over 35 years of age. The plaintiff was shown on his application to be 48 years of age. At trial of the action the defendant sought to defend against the charge of a statutory violation by asserting, first, that its rule under which it refused to process plaintiff's application met the requirements of a bona fide occupational

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[1]29 U.S.C. § 621, et seq.

qualification (BFOQ) within the Act,[2] and, second, that the plaintiff would not have been hired as a flight officer even if there had been no age discrimination. The district judge, however, confined the trial to the validity of the BFOQ claim and refused to permit the defendant to develop fully, or to rule on the defendant's second defense.[3] At the conclusion of the testimony, the district judge upheld the validity of the BFOQ defense and ordered the complaint dismissed. On appeal by the plaintiff, we reversed, finding the defendant's rule not to be a

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[2] 29 U.S.C. § 623(f)(1).

[3] See Smith v. Secretary of the Navy, 659 F.2d 1113, 1119-20 (D.C. Cir. 1981); Day v. Mathews, 530 F.2d 1083, 1084-85 (D.C. Cir. 1976).

valid bona fide occupational qualification.[4] Since the district court had not ruled on defendant's second defense, we remanded the cause for trial of that issue, i.e., whether the defendant would not have hired the plaintiff if there had been no age discrimination. Smallwood v. United Air Lines, Inc., 661 F.2d 303 (4th Cir. 1981).

After the remand and in preparation for the second trial, the parties engaged in discovery. Because of the direction of such discovery as pursued by the defendant, the plaintiff filed a motion for clarification of issues. In support of his motion, the plaintiff argued 1) that the earlier decision had resolved

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[4]It is odd that in Murnane v. American Airlines, Inc., 482 F. Supp. 135 (D.C.D. 1979), aff'd., 667 F.2d 98 (D.C. Cir. 1981), cert. denied, 456 U.S. 915 (1982), on which the plaintiff relies on this appeal, the court held that a rule similar to that involved in this case was a valid BFOQ.

all issues in the case, including the defense that the defendant would not have hired the plaintiff if there had been no age discrimination; and 2) that, even if that latter issue were still relevant on remand, the defendant was strictly restricted in proof of such defense to evidence on "matters arising subsequent to [the first] trial." During argument on the motion, the district judge remarked that the Court of Appeals' opinion in the first appeal was "almost a direction for [him] to consider aspects of the case which [he] didn't consider" and that "the prudent way to proceed [was] to allow the defendant to introduce this additional [evidence which] is apparently not a great deal of evidence." He opined that if the case went back to the Court of Appeals the record would thereby be "in a position that [the Court of Appeals] can decide [the case] and not

send it back here for any more testimony." For this reason, he said, it was proper "to get all that has to be gotten or is proffered by either side into this record now, so that we can decide this case finally, if possible." After the hearing, the district judge denied the motion and, in the exercise of his discretion allowed "the reopening of the record and receipt of evidence on the question whether plaintiff would have been hired by the defendant regardless of age." The cause thereafter proceeded to trial. Both parties offered evidence and at the conclusion of the trial, the district judge, by oral decision, later confirmed by a formal judgment with a later "clarification," found for the plaintiff.

In his oral decision, the district judge began by expressing doubt that "the wouldn't-have-hired-anyway defense" was

"available as a defense" in this case. Without indicating the reason for such doubt, he proceeded, however, to find that such defense was "available as a defense" but that the burden of establishing such defense by the preponderance of the evidence rested on the defendant.[5] He added, however, that in considering evidence of the plaintiff's alleged fraud upon his former employer [which was the defense asserted by the defendant], "it's true that --- or

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[5]As the Court observed in Cohen v. West Haven Bd. of Police Com'rs, 638 F.2d 496, 502, n. 10 (2d Cir. 1980) there is some disagreement among the Circuits on the burden borne by the defendant in connection with this defense. We held in Sledge v. J.P. Stevens & Co., 585 F.2d 625, 636 (4th Cir.), cert. denied, 440 U.S. 981, (1979), that the proper burden was that of the preponderance of the evidence. The Fifth and District of Columbia Circuits, however, had, in Davis v. Board of School Com'rs of Mobile County, 600 F.2d 470, 474 (5th Cir. 1979), modified on other grounds, 616 F.2d 893 (1980), and Day v. Mathews, 530

(Continued)

at least there is some force to the argument that only those facts available to the defendant as of the time of the rejection of the plaintiff's application ought to be considered" but that if any evidence after the time of the rejection of plaintiff's application were deemed "admissible, it seems to me the Court is entitled to be and should be, skeptical of after-the-fact decisions as to what

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[5](Continued)

F.2d 1083, 1085 (D.C. Cir. 1976), opted for the "clear and convincing" burden of proof. We think the district court in this case was correct in following our decision in Sledge, 585 F.2d at 637, especially since it is the very rule sttd by the Supreme Court in Mt. Healthy City Board of Ed. v. Doyle, 429 U.S. 274, 287 (1977), quoted later, and the plaintiff has offered no objection ot this rulikng by the district court.

See also, League Etc. v. City of Salinas Fire Dept., 654 F.2d 557, 558-59 (9th Cir. 1981), expressing some question whether the burden of proof shifted to the defendant under Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

the defendant would have done had it known what it knows now." It followed with a criticism of defendant's action, saying that, if there had been no age discrimination, the defendant would at the time of the application have made "suitable inquiry ... whether or not [plaintiff's] activity with his former employer was such that it [the defendant] would [have been] warrant[ed] ... [in] rejecting him as an applicant" and whether the defendant would have "interviewed [the plaintiff] ... so that he could have at least ... given his side of the story." Though he recognized, as the foregoing comments demonstrated, that the critical issue on remand was the plaintiff's "activity with his former [airline] employer" which caused such employer to fire the plaintiff, the district judge gave no explicit reasons

for his basic decision save this sentence at the end of his decision:

> "I find that the defendant has not borne its burden of proof by a preponderance of the evidence that he would not have been hired anyway after viewing this evidence, bolstered as it has been in the interim between the November, 1979 hearing [at the first trial] and now."

Later, in his judgment order, the district judge added a "clarification" of his decision, "lest there be any uncertainty in the matter." This clarification consisted of but a single sentence:

> "The court's feelings at the time it ruled, as well as now, are that the after-the-fact rationale and testimony of the defendant in this regard, particularly where no opportunity had been given the plaintiff to explain the prior transaction with his former employer, were just not persuasive."

The judgment entered by the district court in conformity with this ruling was in two parts: First, it granted injunctive relief by requiring United to "process" plaintiff's application in the same manner as it processed all other applications received at the time plaintiff filed his application, and, if his application were successfully processed, to include him in the first available class of applicants to be provided flight training, which class the court then found in advance of any processing to be that of January 9, 1978, and to be given all rights and benefits "normally afforded United Air Lines pilot employees, including seniority and longevity rights," and certain pension benefits. Second, it granted backpay, holding that, if the plaintiff's application had been processed free of any violation of ADEA, he would be

entitled to backpay from January 9, 1978, the date it was found he would have been hired absent discrimination, to date of trial of the case, computed to be $92,501.31, which it doubled as liquidated damages, increasing the pecuniary award to the plaintiff $185,002.62. To this it added an attorney's fee of $125,000, together with costs of $2,160.30.

From that part of the judgment granting the plaintiff backpay and attorney's fees, the defendant has appealed, asserting that the court's finding that the defendant had not proved by the preponderance of the evidence that its defense against such award was clearly erroneous, arrived at by the use of improper standards of proof and in complete disregard of the undisputed evidence. It raised, also, alternatively the contention that, even if the court

had been correct in its dismissal of defendant's defense, it erred in the relief granted. The plaintiff cross-appeals, contending that the denial of his motion for clarification was clearly erroneous. Finding no merit in the plaintiff's cross-appeal, we dismiss such cross-appeal, but reverse the judgment awarding the plaintiff backpay relief, finding that the district court's decision and findings in favor of such an award were clearly erroneous.

Before reviewing the evidence connected with the defendant's appeal herein, it is necessary, particularly in view of certain arguments of the plaintiff later noted and of the language of the district court in its oral decision, to identify specifically the issue with which the present appeal is concerned and to distinguish it from the issue decided by us on the first appeal.

We begin such explication by observing that there are generally two issues in disparate treatment cases whether the action be under either the ADEA, Title VII, or Section 1981: One has to do with the substantive issue of violation of the applicable statute or constitutional provision; the other (which, it must be emphasized, only becomes relevant if a violation is proved) involves the remedy which generally presents the question of compelled hiring, reinstatement, or promotion accompanied with backpay. These two issues are separate and distinct and their resolution depends on different, or at least additional, evidence and findings.[6] Thus, in this case, the admitted refusal of the defendant to process the plaintiff's

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[6]Smith v Secretary of Navy, 659 F.2d at 1119-20; Day v. Mathews, 530 F.2d at 1084-85.

application because of its rule prohibiting the processing of job applications by flight officers over 35 years of age constituted, as we held in the first appeal, a violation of ADEA and entitled the plaintiff to injunctive relief against the present and future use of such rule. That specific issue- one of violation- was decided by our decision in the first appeal in this case and is the law of the case. But that determination did not trigger anything more than a mere presumption of a right in the plaintiff to the remedy of employment and backpay, a presumption which was subject to being defeated by proof by the preponderance of the evidence on the part of the defendant that the plaintiff would not have been hired anyway if there had been no discrimination.

This distinction between the two issues, involving as they do separate and

distinct findings based upon separate and distinct facts, was initially explicated in connection with a constitutional claim in Mt. Healthy, 429 U.S. at 285-87, and was later specifically applied in the employment discrimination context in the companion cases of Teamsters v. United States, 431 U.S. 324, 326 (1977), and East Texas Motor Freight v. Rodriguez, 431 U.S. 395, 403-04, n. 9 (1977). In the latter case, the Court said:

> "Even assuming, arguendo, that the company's failure even to consider the applications was discriminatory, the company was entitled to prove at trial that the respondents had not been injured because they were not qualified and would not have been hired in any event."

We have consistently recognized and followed this rule as stated in Rodriguez, the most recent illustration of which being Patterson v. Greenwood

School Dist. 50, 696 F.2d 293, 295 (4th Cir. 1982):

> "When a court finds that a plaintiff has been dicriminated against in violation of Title VII, it retains broad remedial powers to grant injunctive relief and to order such affirmative action as may be appropriate. See EEOC v. Ford Motor Co., 645 F.2d 183, 200 (4th Cir. 1981). When retroactive promotion and back pay are sought, however, further questions must be asked. The statute makes it clear that these forms of relief are available only where the employee would have received the promotion had she not been the victim of discrimination. The case law is also plain that the purpose of a back pay award is to make the plaintiff whole; that is, to restore her to the position she would have occupied but for the discrimination."[7]

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[7]The rationale for this rule that the right to backpay does not exist if the claimant would not have been hired absent discrimination is because such

Although the two issues require separate findings, the resolution of which may depend on different evidence, district courts may in the interest of more efficient administration admit evidence on, and dispose of, both issues in one trial. This was the procedure followed in Murnane v. American Airlines, Inc., 482 F. Supp. 135 (D.C.D. 1979), aff'd., 667 F.2d 98 (D.C. Cir. 1981),

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[7](Continued)

right is authorized not as punishment for the defendant or as a windfall for the plaintiff but only to put the plaintiff in the same position but in no better position than he would have been had there been no discrimination. In Mt. Healthy, the Court said:

> "The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct." 429 U.S. at 285-86.

In Cline v. Roadway Exp., Inc., 689 F.2d 481, 490 (4th Cir. 1982), we stated the same rule:

cert. denied, 456 U.S. 915 (1982), a case very similar on the facts to this case and one relied on by the plaintiff. As here, the defendant commercial airline had refused to process the plaintiff's application for employment as a flight officer because of its rule denying initial employment as a flight officer to persons above a fixed age. That rule was challenged under the age discrimination statute. The defendant airline defended,

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[7](Continued)

> "The ordering equitable principle is that a compensaotory backpay award should only make the wrongly discharged employee monetarily whole under his employment contract; it should not provide a windfall."

See also, Walker v. Pettit Const. Co., Inc., 605 F.2d 128, 129 (4th Cir. 1979), modified on other grounds, 611 F.2d 950; Slatin v. Stanford Research Institute, 590 F.2d 1292, 1293-96 (4th Cir. 1979); Dean v. American Sec. Ins. Co., 559 F.2d 1036, 1038-40 (5th Cir.), cert. denied. 434 U.S. 1066 (1978).

as did the defendant in this case, raising the claim that its rule qualified as a bona fide employment qualification but adding the defense that, if the rule were not a valid BFOQ, and there were age discrimination, still the plaintiff would not have been hired anyway and backpay would accordingly not be appropriate in the case. The court tried the two issues together and made a ruling on both claims. It sustained the BFOQ defense[8] but proceeded, also, to dispose of the second claim, saying in that regard:

> "American contends that since the evidence indicates that it would not have hired plaintiff in any event, plaintiff could not have been injured by any alleged age discrimination and consequently is entitled to no relief. The Court concurs." 482 F.Supp. at 148.

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[8]See note 4, supra.

On appeal that ruling on the right to backpay was affirmed with this statement:

> "In the case at hand, as we have already stated, there is 'credible and persuasive evidence' that appellant would not have been selected for the position he claims to have been illegally denied, whether or not the age requirement he objects to was illegally discriminatory. Therefore, applying the principles in the Supreme Court cases just discussed, we conclude that appellant cannot prevail on this appeal." 667 F.2d at 102, cert. denied. 456 U.S. 915.

The Court in that case thus decided both issues on the basis of a single record.

While there is no question that the two issues, though requiring separate and different evidence and standards of evaluation, can be tried together, as was done in Murnane, that is not the only way the issues may be tried. A court may bifurcate the trial of the two issues.

Such was the procedure in a class action approved by us. Sledge v. J. P. Stevens & Co., 585 F.2d at 637. The district judge made it clear throughout the first trial in this case that he was considering only the violation issue. Thus, he repeatedly- ultimately, with considerable emphasis and finality- ruled that he would not permit the defendant to inquire either on cross-examination of the plaintiff or by direct evidence fully into the circumstances of plaintiff's termination as a flight officer by his previous airline employer, Overseas National Airways (ONA). He in effect by these rulings bifurcated the two issues in this case. If in this case the district court had been sustained in its decision on the defendant's BFOQ defense in the bifurcated trial, its method of handling the case would have saved the court the problem of developing a full

record and making a ruling on the remedy issue. We however, found on appeal that the BFOQ defense was faulty, and remanded the cause to resolve the remedy issue, as we said in our first opinion. Therefore, the sole issue on remand, for trial by the district court, was the issue the district court did not decide, i.e., whether the defendant had established by the preponderance of the evidence that it would not have hired the plaintiff absent age discrimination. The resolution of that issue required the full examination of plaintiff's termination as a flight officer by his former airline employer, Overseas National Airlines (ONA).

The plaintiff, however, disagrees with this analysis of the issue that was presented at the second trial and that is presented on this appeal. He argues that the BFOQ defense (which he denominates as the "statutory defense") and the remedy

defense are not separate issues but are interdependent and that the determination of the first, (the BFOQ defense) is conclusive under principles of res judicata of the second (the backpay remedy). He phrases this argument in his brief thus: "Asserting a BFOQ defense logically eliminates the other statutory defense- that the rejection was based upon a reasonable factor other than age (citing Murnane, supra). Since United asserted but failed to prove its BFOQ defense, its liability was established, and it cannot now rely upon the (second) defense."[9] Citing § 7(a) of the ADEA, he urges that a finding of a violation under the Act carries with it a mandatory finding of entitlement to backpay, and "precludes the defense of 'wouldn't have

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[9]The plaintiff identifies this second defense a the "RFOA" defense (a reasonable factor other than age).

hired anyway' (italics in brief)." Such an argument is manifestly contradictory of what the Supreme Court said in Mt. Healthy, 429 U.S. at 286-87, and what we held in Patterson v. School District 50, 696 F.2d at 295.

In Mt. Healthy, as we have seen, the Supreme Court directed that in discrimination cases, whether under Title VII or under ADEA, the trial court should first determine whether there was a violation and that, if it found a violation, then it should consider and resolve "the defense of 'wouldn't have hired anyway." Moreover, any contention that a finding of violation carries with it an inescapable ruling in favor of backpay is contradictory of our first decision in this case in which we reversed the ruling of the district court of no-violation but remanded the case in order that the district court might resolve the issue

which had not been resolved by the district court in its first decision, i.e., the issue of backpay.[10] On that remand, which would have been unnecessary if plaintiff's argument were sound, it was both proper and necessary for the district court to do what the court in Nanty v. Barrows Co., 660 F.2d 1327, 1334 (9th Cir. 1981) said it should do in such a situation and that is: "afford [the defendant] the opportunity to prove by 'clear and convincing' evidence that [the plaintiff] ... in the absence of discrimination , ... would not have been hired." And this is what was done in this case. The dispositive question in the case thus became whether the defendant had satisfied its burden with proof and, if it had, it would have rebutted the plaintiff's claim for

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[10] See 661 F.2d at 306, n. 3.

backpay. Whether the defendant has satisfied this burden depends on an analysis of the record developed at the second trial. We accordingly turn to the evidence on the issue before the district court.

As we have said, the ground on which the defendant claimed it would have refused to employ the plaintiff as a flight officer if there had been no discrimination was the circumstances of the plaintiff's discharge as a flight officer by ONA on February 13, 1976. The reasons for such discharge were summarized in ONA's letter of discharge addressed to the plaintiff on that date:

> "Upon a full evaluation of all of the information available to this Company, as well as the information which you have provided, it has been determined that you have, in a most calculated manner, abused privileges which were extended to you both as

> an employee of this Company and as a flying officer. We have concluded, based on the available evidence, that you misused your ATP card in that you billed flights undertaken by your children to the Company. Moreover, and of the utmost importance, you secured a purchase order for an amount in excess of $2,000 for a move which you knew, or should have known, was not actually to be accomplished.
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> "Overseas National Airways regards each incident to be of such a serious nature that either, standing alone, would constitute grounds for discharge. In view of all circumstances, this Company has no choice but to advise you that your services with ONA are hereby terminated."

There was later a hearing on these reasons for discharge before a Board of Adjustment, convened on the demand of the plaintiff under the terms of the agreement between the plaintiff's Union

and the airline.[11] At this hearing, which was held on February 1, 2, 3, and 8 and May 17, 1977, the plaintiff, assisted by a representative of his Union, and the employer were heard. Both parties stated their respective positions and offered evidence in support. The plaintiff does not contend that the hearing was unfairly conducted or that there was any denial to him of the right to present his evidence. The record is full and complete. All the hearings and the briefs of the parties to the proceedings preceded the filing of plaintiff's application for employment with the defendant and were

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[11]Under the collective bargaining agreement between the Pilot's Union and ONA, an employee discharged by the employer, had a right to demand a hearing to investigate and rule on the discharge before an Adjustment Board, consisting of two members selected by the Union, two by the employer and an impartial Referee selected by the other members of the Board.

fully known to the plaintiff. Later the impartial Referee filed a lengthy report, which was concurred in by two other members of the Board. The members of the Board who did not concur in the result recommended by the impartial Referee did not, however, take any exception to the Referee's review of the evidence, or to his findings on the basis of such evidence; their objections seemingly were directed at the severity of the penalty. Nor, for that matter, has the plaintiff offered any objections to the statements in the Referee's report, summarizing the positions of the parties or the evidence offered, though he does argue that the penalty was too severe. That report and the record are a part of the trial record herein. It seems fair under these circumstances to look to this report for a statement of the circumstances of plaintiff's discharge.

As the report of the impartial Referee makes clear, the first basis for plaintiff's discharge by ONA was the procuring by the plaintiff of a purchase order from ONA in June, 1975, to cover moving expenses arising out of plaintiff's change of base from California to New York City. Under the agreement between the Pilots' Union and ONA, reimbursement was to be had for "[m]oving expenses ... only when a pilot moves from a previous base to his new base ... if the pilot locates within one hundred fifty (150) miles from the new base." In securing the purchase order, the plaintiff represented he was moving to Cherry Hill, New Jersey, a location within 150 miles of plaintiff's new base of New York City. The plaintiff, however, did not move, and there was no evidence he ever intended to move to Cherry Hill. He actually moved, as he apparently always

intended to Burke, Virginia. Burke was concededly not within 150 miles of New York. His household goods and furniture arrived in Burke from California on June 24, 1975 and were placed in a home in Burke which the plaintiff had contracted for on June 25.

Under the explicit language of the agreement, as quoted above, the plaintiff was not entitled to reimbursement for moving expenses for his move to Burke and, had he not represented falsely that he was moving to Cherry Hill he would not have had a right to the purchase order from ONA. The plaintiff would excuse his misrepresentation as due to a misunderstanding of the language of the agreement. The Adjustment Board was unable to accept that excuse. We are likewise unable to accept it. The language of the Agreement is clear. It is inconceivable that one with the educational background

and business experience of the plaintiff could have misunderstood the simple language of the Agreement. The plaintiff was a graduate engineer and a graduate lawyer who had been both a University instructor in law and an active legal practitioner in several states.[12] In addition, his conduct demonstrated he understood the Agreement's limitation upon a right to moving expenses. ONA offered proof that before the plaintiff had procured his purchase order to cover moving expenses to Cherry Hill, he had requested a waiver of the 150-mile limitation on his right to moving expenses and his request had been denied. In the face of this conduct, the plaintiff was in no position to claim he did not under-

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[12]Actually, his application stated he was engaged in the practice of patent law at the time.

stand the provision of the Agreement relative to moving expenses.

Moreover, a majority of the Adjustment Board, in their findings, concluded that the plaintiff had misled ONA into issuing a purchase order in his favor for moving expenses by intentionally misleading ONA to believe that he was moving his residence to a location within 150 miles of New York. The report points out in substantiation of this conclusion that the plaintiff ordered stationery with his address given as Cherry Hill, rented a post office box and arranged for a telephone listing (though the listing was of an answering service) in Cherry Hill, and, after he had moved to Burke, had written ONA "on New Jersey stationery, and called specific attention to his New Jersey telephone number (which was not at his 'residence')." The Adjustment Board majority found that at

no time, either before or after his moving to Burke, had the plaintiff made any effort to secure, or had any intention of establishing a home in Cherry Hill, and that, in the Referee's opinion, his actions in procuring stationery, showing his address as Cherry Hill, and the use of an answering service's number in Cherry Hill, "suggest deliberate deception" on the plaintiff's part. This conduct of the plaintiff, in the Referee's opinion, "was a most serious act, one which would normally call for the severest of penalties" (which it would be assumed meant discharge).

There was, also, a second delinquency charged against the plaintiff in the letter of termination, equally serious. It involved the use of his ATP card in purchasing transportation for his children from California east. The purpose of issuing an ATP credit card to

flight officers was "to enable employees, such as captains" to secure transportation "from one place to another to pick up or leave scheduled Company flights" but specifically such card was "not to be used for the travel of dependents, whether for personal pleasure or pursuant to a move." The use of the card by the plaintiff for a purpose known to him to be improper was an inadmissible charge to ONA.

ONA, however, had proscrastinated in taking prompt action against the plaintiff after discovering this misconduct on his part. It offered what appears to have been plausible excuses for such delay but a majority of the Adjustment Board decided that, because of this delay, an eighteen (18) month suspension rather than outright termination was in order. But, in agreeing to such penalty,

the impartial Referee chose to add this statement:

> "A severe penalty certainly was warranted, since the grievant's misconduct was extremely serious ....
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> "While rescinding the discharge, the undersigned wants to emphasize that he in no way condones the grievant's handling of his financial relations with the Company. Since pilots are virtually unsupervised in their daily activities, they must be completely trustworthy, both in large and small transactions."

All of these facts, so carefully spelt out in the Report of the Referee were exposed both by ONA's investigation and at the Board's hearings, which occured before plaintiff filed his application for employment with the defendant. The plaintiff sought to moderate this serious transgression by asserting that he admitted to the ONA in

August, 1975, that he had actually moved to Burke and not to Cherry Hill, and that he had reimbursed ONA for his children's transportation His admission of his move to Burke, however, was quite some time after he had procured his purchase order on the representation he was then in the process of moving to Cherry Hill, according to the Referee's Report; his reimbursement for his misuse of his ATP card occurred only after ONA had discovered the misuse and was threatening disciplinary action against plaintiff. He conceded at the hearing that his actions under investigation may have been "questionable" and that he may have been negligent in saying he was moving to Cherry Hill rather than Burke, but "he was under great [domestic] pressures" at the time and in any event "the penalty

was grossly inappropriate." The plaintiff even contended at one time that ONA had "deliberately entrapped" him into making admissions related to his transgressions as an employee of ONA. There can be under this record no reasonable basis for finding that the plaintiff had not engaged in misconduct reflecting on his trustworthiness, which misconduct led to his lengthy suspension by ONA as a flight officer.

The district judge, in his oral decision at the conclusion of the trial herein finding that the above evidence did not persuade him that the plaintiff would not have been hired anyway, made no specific findings of fact of his own nor did he indicate disagreement with any of the factual findings set forth in the Report filed by the impartial Referee of

the Adjustment Board, filed as a part of the record herein. The only clue to the district judge's rationale for his decision against the defendant's defense appears in three comments made by him in his oral opinion and in his later clarification. No one of these comments relates to the actual facts and circumstances of the "alleged fraud" practiced by the plaintiff against his employer, ONA. The factual showing in the record of such misconduct by the plaintiff while in the employment of ONA seems to have been accepted by the district judge. The district judge's primary objection to the defendant's defense as based on these undisputed facts was that these facts and the conclusion they required represented an "after-the-fact rationale," because the

facts had not been "available" to the defendant at the time the latter refused to process plaintiff's application for employment. He declared that he had great doubt whether such "after-the-fact" evidence should be admitted but if "admissible" it was the duty of the court to view it with skepticism. It seems, also, that the district judge felt that the defendant should have, before refusing to process the plaintiff's application, offered the plaintiff an opportunity to give his side of his difficulty with ONA.

The idea that the defense, based as it was on undisputed facts, should be dismissed or burdened with a heavy cloak of skepticism because it was an "after-the-fact rationale" is a reason that is completely contrary to the bellwether

case in this area of Mt. Healthy. In that case, the Court said:

> "Initially, in this case, the burden was properly placed upon respondent to show that this conduct was a 'substantial factor'- or, to put it in other words, that it was a 'motivating factor' in the Board's decision not to hire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." 429 U.S. at 287.

In short, the Supreme Court instructed district courts in cases where the issue is such as here that they "should" proceed to make the "after-the-fact rationale" which the district court in this case deprecates. Moreover, it nowhere countenanced the idea that the evidence on this issue was to be treated with skepticism; the clear inference is that such evidence was to be weighed by the same standards as other testimony.

This construction of Mt. Healthy has been followed in repeated decisions; in fact, we have found no authority which supports the district court's condemnation of what it chacterizes as the "after-the-fact rationale" in this context. Certainly, the court did not follow this reasoning of the district court in Murnane, in which, as we have seen, the airline had, as the defendant

here, first refused to process the plaintiff's application under a policy of not processing applications for employment as a flight officer by one who was over 40 years of age. But the defendant was permitted to prove by other facts later developed it wouldn't have hired the plaintiff anyway. We did the same in Patterson, 696 F.2d 293. Moreover, this procedure is, as the Court described it in Gibson v. Mohawk Rubber Co., 695 F.2d 1093, 1097 (8th Cir. 1982), "[c]onsistent with the ADEA's purpose of recreating the circumstances that would have existed but for the illegal discrimination" in determining whether a claimant is entitled to backpay. And, there is nothing unusual in a court resolving what a party to litigation would or should have done under certain circumstances. It is done repeatedly in tort cases. Courts have

not bridled in these cases at making "after-the-fact rationale[s]." Neither may they in cases such as this.

Similarly, there is no support in the authorities for the doubt expressed by the district court in its oral opinion on the availability ("not available") of the defense that the plaintiff "wouldn't have been hired anyway" because that point was not raised at the time the plaintiff's application was initially denied processing. Murnane is a perfect answer to such expression of doubt. The defendant there did not raise plaintiff's disqualification for employment when it refused to process plaintiff's application and the evidence on which it rested its contention that the plaintiff would not have been hired "anyway" all involved incidents occurring months after

the court had found the defendant had refused to process plaintiff's application because of his age. Our own case of Patterson, 696 F.2d at 295-96, is likewise in point. There the district court found that the defendant, in filling a vacancy of assistant principal, had "improperly discriminated against [the plaintiff] in violation of Title VII." The defendant did not on appeal except to this finding. Its defense was that "at least four of the five interviewers [who made the selection in question] would have selected another female applicant ahead of plaintiff for reasons other than prohibited discrimination," and thus the plaintiff would not have been selected "anyway." It supported this contention with the evidence of the interviewers. We ordered judgment in favor of the defendant on the issue of backpay because

the evidence demonstrated that the plaintiff would not have received the promotion had there been no sex discrimination. Even in Rodriguez v. Taylor, 569 F.2d 1231, 1240-41 (3d Cir.), cert. denied, 436 U.S. 913 (1978), the court said that if the defendant had offered proof at trial [there was no bifurcation of issues in this case] that the plaintiff at any time prior to trial had failed the civil service examination, he would have been denied backpay. In summary, what these cases show is that the disqualification for employment and thus for backpay, based on a "recreating [of] the circumstances that would have existed but for the illegal discrimination,"[13] may be established by evidence

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[13]Gibson v. Mohawk Rubber Co., 695 F.2d at 1097.

which had not been developed at the time the claimant was denied employment, provided such evidence is proved at trial of the remedy issue. In this case, the defendant's evidence that the plaintiff would not have been hired absent age discrimination because of the circumstances of his discharge for misconduct by his prior airline employer was in existence at the time the plaintiff's application was denied processing [a fact different from Murnane where the evidence of disqualification occurred after refusal to process] and the evidence that the defendant would not have hired anyone guilty of such misconduct as a flight officer was undisputed.

The feeling of consideration for the plaintiff, as expressed by the district judge in his comment that the defendant should have given the plaintiff an opportunity to give his side of his contro-

versy with ONA is misplaced. Of course, the defendant had not occasion to discuss the plaintiff's discharge by ONA with the plaintiff at the time it refused to process plaintiff's application. It had disqualified the plaintiff for employment because his statement of his age in the very first part of the plaintiff's application made any inquiry into plaintiff's prior employment unnecessary under the defendant's BFOQ rule. It was only later when it made inquiry of ONA that the fact of plaintiff's discharge came to defendant's attention. It acquired then the full proceedings before the Adjustment Board. The plaintiff had given such explanation as he could with reference to the two actions resulting in his discharge at the hearing before that Board. His discharge was injected into the case at both trials in this court, though the

court at the first trial denied the defendant opportunity to examine it fully. At both of these trials, the plaintiff had his opportunity to make such explanation as he wished. The tenuousness of that explanation is evident in the record both of this trial and of the Adjustment Board hearings. In view of these opportunities to explain his "side of the story" it would have been a waste of time to request of the plaintiff another explanation.

It is thus clear that, so far as any of the reasons assigned even obliquely by the district court as a basis for dismissing the defendant's defense, they cannot justify a dismissal of the defendant's defense. Moreover, the facts in support of the defense [the grounds for plaintiff's discharge by ONA] are

fully detailed in the record and completely justified the defendant's action. Under these circumstances, the district court's conclusion dismissing this defense based on the reasoning stated by such court, is clearly erroneous.

But the plaintiff himself, in his brief in this Court, has sought to state reasons other than those suggested by the district judge for upholding the court's decision awarding backpay. It is interesting that these reasons do not relate to the accuracy of the conclusions by the Adjustment Board majority on plaintiff's misconduct while employed by ONA. His reasons in effect assume the correctness of the findings of the Adjustment Board majority and rest on the

hypothesis that the plaintiff's conduct so established and found, and as established in the record here was irrelevant and any evidence of such misconduct should not have been received. It is doubtful that the plaintiff ever raised properly this issue before the trial judge. Whether plaintiff did or not, it is manifest from the record that the district judge never ruled on the point. Certainly, there is no reference to the claim either in the district judge's oral decision or his clarification. But, assuming that the point is properly before us, though, we find it without merit.

This argument of the plaintiff is that proof of his "alleged fraud" upon his former airline employer which caused that employer to discharge him is irrelevant to his qualifications mechani-

cally to operate and pilot an airplane and is, therefore, irrelevant to the issue to be resolved herein, which, he contends, is confined to the ability mechanically to operate and pilot an airplane such as that used by the defendant in its operations. To be more specific: What the plaintiff contends is that trustworthiness, reliability and honesty are in no way required or expected of a pilot of a large commercial plane, to whose substantially unsupervised competency, trustworthiness, reliability, and fidelity to the rules and regulations is committed the safety of the scores of passengers on the plane he pilots. We are unwilling to accept this argument. The logs a pilot maintains, the accuracy of his reports, the faithful and exacting observance of all the safety rules and regulations and their accurate and punc-

tual recording, all are vital to the safety of the plane's passengers and all depend on the trustworthiness, truthfulness and reliability of that pilot aloft, where he operates largely free from any effective supervision. Any argument that the only qualification of such a flight officer is his mechanical ability to manipulate the various controls of the plane completely lacks conviction. And the evidence in this record demonstrates the necessity for these additional qualifications of trustworthiness and reliability.

The officer of the defendant, who had the responsibility for evaluating applications for employment as flight officers by the defendant, testified to the reasons why trustworthiness and reliability were essential qualifications for employment by a commercial airline of a flight officer. He said:

"Well, I think there are two major reasons. The first being a general statement that United Air Lines is involved with providing a service to the public and we have to create an honest and sincere image with the public. So any employee of United must demonstrate integrity and honesty. In the case of a cockpit crew member, however, I think there is an added factor that comes into it, and that is that cockpit crew members for the most part are people that you have to trust since you can't oversee their operations on a day-to-day basis. You simply can't supervise them. If you're making widgets, you walk down on the floor and see how production is going; but in the case of a flight crew, they may be at 39,000 feet or two miles up and there is no way that you can on a daily basis supervise their work. So it's doubly important that they demonstrate integrity and honest."

The impartial Referee on the Adjustment Board who, undoubtedly was selected by the other members of the Board because of his expertise in employment relationships involving commercial airlines, had earlier confirmed this essential qualification for a flight officer on a commercial airline. He had written in his formal report on plaintiff's grievance against ONA: "Since pilots are virtually unsupervised in their daily activities, they must be completely trustworthy, both in large and small transactions." Moreover, a majority of the Adjustment Board was of the opinion that such trustworthiness and reliability were to be deemed requirements for the proper performance of a flight officer's employment. If this were not so, there would have been no justification for an eighteen months' suspension of the

plaintiff or of his discharge. Nor was this all that was in the record on this point. The plaintiff himself had, prior to his discharge by ONA, sat as a member of an Adjustment Board, investigating another flight officer's grievance arising out of misconduct similar to that of the plaintiff here, and the plaintiff joined in a penalty of an eighteen months' suspension for the offending employee. Thus, in the opinion of the plaintiff, his transgression was of such a serious character so as to justify the severe penalty. That penalty could not have been justified if that misconduct had not gone to the faithful performance of his duties and responsibilities as a flight officer. In the face of this record, this point loses any value.

Finally, the plaintiff argues that, even if we were to conclude that it was clear error for the district court not to uphold defendant's defense, this decision should not operate to "cut-off [plaintiff's] entitlement to damages prior to the time that the disqualification determination was made." In effect, the plaintiff is contending that, though we may find that the plaintiff would not have been hired anyway based on facts existing at the time he filed his application for employment with the defendant and facts upon which would have been developed in a reasonable processing of such application by the defendant - - a finding which, the plaintiff seemingly concedes for purposes of the argument would foreclose a backpay award-- that finding would only operate to bar backpay from the date we made that determination

and that for the period between the date when he would have been employed if there had been no disqualification and that of our determination, he would be entitled to backpay. This argument we find untenable. This question is whether the plaintiff would not have been hired had the defendant followed its normal procedure and processed the plaintiff's application as it did all others. Such processing would have included inquiries of the plaintiff's former airline employer as listed on his application form. That inquiry would have elicited the full evidence of the circumstances of plaintiff's discharge by ONA. The information received from ONA would have meant the plaintiff would never have been hired by the defendant as a flight officer. Under those circumstances, the plaintiff would have, like the plaintiffs in

Murnane, Patterson and Gibson, not been entitled to backpay. Neither Rodriguez v. Taylor, 569 F.2d 1231, nor Houghton v. McDonnell-Douglas Corp., 627 F.2d 858 (8th Cir. 1980), the two authorities cited by the plaintiff in support of his theory, is on point.[14]

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[14]In Rodriguez the defendant had stood mute after the plaintiff had established a prima facie case, even though it had a perfect defense that the plaintiff would never have been employed because he could not pass the required civil service examination. Had the defendant offered proof of that fact, if it had given the test before trial and proved the plaintiff's failure, the defense against the award of backpay would have been sustained and the action dismissed so far as that issue of backpay was involved. And the Court said exactly this. What the defendant did was to delay until after judgment before it gave the test. That it was this delay that was the basis for dismissal of the defendant's defense is obvious from this language of the opinion:

It follows from what we have said that it is incontestable on the record that the plaintiff would never have been employed by the defendant as a flight officer on the basis of his 1977 application. The circumstances of his termination by ONA, fully developed in the record, were such that, under its customary procedure for evaluating applicants for employment as flight officers, the defendant would unquestionably not

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14 (Continued)

> "The City might well have satisfied its burden of production and conclusively settled the ultimate issue of Mr. Rodriguez's qualifications had they only administered to him the written civil service exam

have found the plaintiff qualified for employment. Neither the district court nor the plaintiff has suggested a single fact or circumstance that would support a contrary conclusion. The district court's purely conclusory statement supported by no explicit fact finding, is inadequate. EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633 (4th Cir. 1983); Holsey v. Armour & Company, 683 F.2d 864 (4th Cir. 1982).

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14 (Continued)

> prior to trial. Instead, the City failed to promptly administer the written exam precluding development of material evidence on this issue until after trial. The importance of requiring employers to adhere to their evidentiary burden at trial is underscored by consideration of the consequences of delaying final determinations of Mr. Rodriguez's back pay award until the exam was taken (Emphasis added)." 569 F.2d at 1240.

It remains to be decided what disposition to make of this appeal under these circumstances. Ordinarily, the procedure would be to remand the cause to

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14 (Continued)

The defendant in this case has not stood mute or delayed to present its evidence until after trial. The defendant has at trial adduced clear proof why it would never have employed plaintiff absent discrimination.

In Houghton, the defendant had no specific age limitation on retention of test pilots. The plaintiff had been terminated for age, it being the defendant's contention that the plaintiff "could no longer qualify" as a production test pilot. The testimony was addressed to the point whether the plaintiff was qualified at the time he was fired and up to February 18, 1975. Both parties adduced testimony directed to such point. The jury decided in a verdict that he was so qualified.

(Continued)

the district court for resolution. However, this appears to be one of those exceptional cases such as Patterson where it is obvious from a thorough review of the undisputed record that there is but one possible resolution of the critical issue on this appeal and that "any other

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14 (Continued)

The court in the first appeal decided that up to February, 1975, the plaintiff was entitled to backpay but ruled that, after that date, his qualifications were open to proof. The cause was remanded to determine that question. On remand that question was resolved against the plaintiff. That case presents a situation unlike the one here.

As we have said, neither case parallels the present case. Unlike the defendant in Rodriguez, the defendant in this case sought and was denied at the first trial the right to prove the plaintiff's disqualification for employment; at the second trial, however, the defendant did establish such disqualification.

resolution by the district court would be clearly erroneous." In that situation it is not necessary to follow the unusual rule of remanding the cause to the district court for further action: it is appropriate for us to make the finding that the defendant would not have hired the plaintiff if there had been no age discrimination and thus reverse the finding of the district court that the plaintiff is entitled to backpay and order dismissal of plaintiff's claim to the processing of his application and to backpay.

Reversed and remanded for the entry of an appropriate judgment.

IN THE UNITED STATES COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

GERALD E. SMALLWOOD, Plaintiff,	)	
V.	)	CIVIL ACTION NO.79-466-A
UNITED AIR LINES, INC., Defendant.	)	

O R D E R

For the reasons set forth in the Memorandum Opinion this date filed, it is hereby ORDERED that:

1. The defendant United Air Lines, Inc., shall forthwith process the employment application of the plaintiff, Gerald E. Smallwood. The processing of Mr. Smallwood's application shall commence at the point previously terminated and shall include all normal testing, training and evaluative procedures as applied to all applicants processed at the time of his original application.

All such processing shall be completed by January 1, 1983. Provided he successfully completes the application process, the plaintiff Smallwood shall be included in and trained with the first class to enter United's Flight Training Center upon the event of its re-opening. For purposes of initial training, the probationary year of employment and all further and future recurrent training, Smallwood shall be treated in like manner as a United Air Lines employee similarly situated. Provided he successfully completes Flight Training Center initial training, Smallwood shall receive all rights and benefits normally afforded United Air Lines pilot employees, including seniority and longevity rights as though he had been hired with the class of January 9, 1978.

2. On issues related to Smallwood's pension benefits, the court finds that Smallwood shall have the right to elect between the alternatives that would have been available to him if he had been hired with the class of January 9, 1978 and furloughed on September 15, 1981. These alternatives include allowing pension contributions to remain on deposit for an accrued monthly benefit of $182.27 per month upon attaining age 60, or electing to receive the present cash value of the fund in the amount of $10,720.63. Plaintiff Smallwood shall make his election in this regard within sixty days of the date of this order.

3. Attorneys' fees and costs are granted as follows:

Attorneys' fees	$125,000.00
Costs	2,160.30
Total	$127,160.30

4. The order of September 20, 1982 is amended so that the date appearing on the last line in the text on the second page reads January 9, 1978, instead of January 9, 1981.

/s/
United States District Judge

Alexandria, Virginia
October 20th, 1982

IN THE UNITED STATES COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

GERALD E. SMALLWOOD,	)	
	)	
Plaintiff,	)	
	)	
V.	)	CIVIL ACTION
	)	NO.79-466-A
	)	
UNITED AIR LINES, INC.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

As contemplated by the court's order of September 20, 1982, injunctive relief and the extent of plaintiff's entitlement to an award of costs and attorneys' fees were to be the subject of a future decree and ruling, respectively. The defendant also asked for a clarification of the court's prior ruling.

Attorneys' Fees

Under Anderson v. Morris, 658 F.2d 246 (4th Cir. 1981), the court should first determine the number of

hours the requesting attorneys reasonably expended in the prosecution of the action, and multiply that by the attorneys' customary hourly rate of compensation. The figure thus reached should then be adjusted using the other ten factors outlined in Barber v. Kimbrell's, Inc., 577 F.2d 216, 226 (4th Cir. 1978).[1]/

The determination of what hours were expended is not to be made by blindly accepting the attorneys' time sheets. Instead a determination of what is reasonable must be made.

---

1. Factors 1 and 5 of the 12 factors prescribed by Barber are those factors which, under Anderson, enable the court to arrive at the initial figure.

Here the plaintiff asserts that approximately 1,070 hours were expended by various attorneys on the case, and 317 hours by persons who were law clerks or paralegals. The total amount claimed, at current rates, on strictly a time basis is $112,198.50. In the court's view, current rates are an appropriate factor to be considered in view of the delay in any payment during the progress of the suit, inflation, and lack of any allowance of interest. The suit has been ongoing since May 18, 1979. In addition to the $112,198.50, asserted as the "lodestar" figure, plaintiff asserts that the other factors to be considered by the court warrant an increase of the fee to $200,000.

An examination of the plaintiff's time sheets reveals no ascertainable duplication of work or any

wasted effort or proliferation of attorneys. While there is some travel time, the court is unwilling to reduce the award on this basis. The attorneys had to travel and that time is time that they could have used otherwise at their regular hourly rate. The employment of paralegals for routine tasks and law clerks for research are practices now accepted in most law offices, and while the time required for a paralegal or law clerk to do the work may be longer than the time required for an attorney to do it, this probably averages out in the differences in the hourly rates charged. No unnecessary pleadings were filed in the case. It was appropriate for the plaintiff to prepare for the expected defenses, particularly the economic defense anticipated at trial. The use of two attorneys, review by those attorneys

of the work of the paralegals and law clerks, and the telephone calls and conferences all seem reasonably necessary to a proper prosecution of the case. Nor can the court say that the time spent in monitoring the Murnane[2]/ case was wasteful. It could well have resulted in a more expeditious handling of the instant case. Accordingly, the court finds that the hours expended were reasonable. Moreover the court also finds that the rates charged for this type of work and consistent with the rates charged for that work in this geographic area.

Novelty and difficulty of the questions raised. The case was not complex factually. It was tried in a day. The

2. Murnane v. American Airlines, Inc., 482 F.Supp. 135 (D.D.C. 1979), aff'd. 667 F.2d 98 (D.C. Cir. 1981), cert. denied ___ U.S. ___ (1982).

plaintiff presented three witnesses and the defendant two. However, the legal issue presented was novel if not complex. Until the decision of the Court of Appeals, apparently no court had decided the precise issue granted in plaintiff's favor. Indeed the Murnane case was apparently against the plaintiff. Some upward adjustment is warranted under this factor.

The skill required to perform properly the legal services rendered. Counsel for plaintiff performed their tasks well. Faced with an adverse ruling at the trial court, they obtained a reversal by the Court of Appeals and successfully opposed the defendant's application for certiorari to the Supreme Court. On remand they were successful in defeating the defendant's alternative "wouldn't-have-hired-anyway" defense.

That the case was tried in the district court in such a relatively short time was in part because it was well organized and expeditiously presented. The written submissions were expertly prepared and the legal issues thoroughly researched. Some upward adjustment is warranted under this factor.

The attorney's opportunity costs in pressing the instant litigation. There is no evidence that in accepting this engagement counsel for the plaintiff forewent any other retainer, although of course time was spent on this action which presumably could have been profitably spend for other paying clients. There is no indication that counsel have time on their hands, or that this was their firm's only case or one of relatively few cases.

The attorneys' expectations at the outset of the litigation. The case was originally taken on a contingent fee basis of 1/3 of recovery (PX 8). After the October 8, 1981 decision of the Court of Appeals the fee arrangement was modified by letter of May 6, 1982 (PX 8). That letter indicates that the original 1/3 fee arrangement extended only through trial and, indeed, the 1/3 contingent fee arrangement so provides. At the original trial of course the plaintiff secured nothing. While there is authority for the proposition that a litigant should not be awarded a fee greater than he was contractually bound to pay, Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 718 (5th Cir. 1974), under the circumstances here it would be unfair to limit attorneys' fees to 1/3 of the monetary recovery.

The time limitation imposed by the client or circumstances. This is not a relevant factor in this case. The only time limitation was a rather tight discovery and trial schedule imposed by the court - a limitation suffered by all litigants in this court.

The amount in controversy and the results obtained. The amount in controversy has turned out to be approximately $185,000. This, however, should not in this case be determinative of an appropriate fee. The result obtained insures his being reprocessed for hiring, and the ruling of the Court of Appeals will benefit others. Some upward adjustment is warranted in this factor.

Experience, reputation and ability of counsel. The reputations of counsel for the plaintiff are excellent, but not so great that they would put

their services at a premium sufficient to warrant an increase or upward adjustment in the fee.

The undesirability of the case within the legal community in which the suit arose. There is no indication that this case is undesirable from the point of view of counsel's contemporaries.

The nature and length of the professional relation between attorney and client. There is no evidence that this is anything except a single instance of representation of this plaintiff by these attorneys.

Attorney's fees awarded in similar cases. Fees in cases of this novelty which progress through the Court of Appeals and the Supreme Court are substantial. While novel, however, the issue was narrow; the number of others

benefited by the ruling is not shown to be great; the amount of time spent on the case in its preparation and particularly its trial, is not unusual, although the result obtained, as indicated, is excellent. Under these circumstances, with a monetary recovery of $185,000, similar cases command a fee in the $100,000 range.

In light of the foregoing, a fee of $125,000, representing a lodestar figure of $112,000 plus a bonus for the factors warranting adjustments of approximately 10%, will be awarded.

Costs

Costs disbursed in the amount of $3,854 are requested. In the court's view such things as telephone calls, Xeroxing, copying costs, and delivery service costs are part of ordinary office overhead. While they may be appropriate

in billing a private client, they ought not to be assessed against a third party. The travel and lodging costs of Mr. Huennekens for a trip to Fairfax apparently to assist in legal research will not be allowed. Nor will the mileage and parking costs. Those costs which will be allowed are:

Court costs	$ 515.18
Deposition costs	581.70
Printing costs	584.42
Expert witness fee	479.00
Total	$ 2,160.30

Injunctive Relief

Each party has submitted a proposed injunction. The court finds the one proposed by the defendant to be appropriate and has incorporated it in the order accompanying this Memorandum Opinion. The plaintiff's submission included a determination of the amount owed under the pension plan and a doubling of this amount as liquidated damages as well as a retention of juris-

diction to determine, apparently, whether, if the plaintiff is rejected for reasons other than age, that rejection is proper. The court is unwilling to award the liquidated damages as requested but prefers to allow the plaintiff the option referred to in the order. Moreover the court sees no need to monitor the defendant's processing of the plaintiff for hire.

Clarification

The court is of the opinion that its order of September 20, 1982 adequately addresses the issue on which the defendant seeks clarification; however, lest there be any uncertainty in the matter, the court found that the defendant had not shown by a preponderance of the evidence that it would not have hired the plaintiff in any event

because of the plaintiff's alleged fraud against his prior employer. The court's feelings at the time it ruled, as well as now, are that the after-the-fact rationale and testimony of the defendant in this regard, particularly where no opportunity had been given the plaintiff to explain the prior transaction with his former employer, were just not persuasive.

/s/
United States District Judge

Alexandria, Virginia
October 20th, 1982

IN THE UNITED STATES COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

GERALD E. SMALLWOOD, Plaintiff,	)	
V.	)	CIVIL ACTION NO.79-466-A
UNITED AIR LINES, INC., Defendant.	)	

O R D E R

For the reasons stated from the bench, which the court adopts as its findings of fact, it appearing that the defendant has not shown by a preponderance of the evidence that it would not because of reasons other than age have employed the plaintiff anyway; that the plaintiff would have been employed with those persons who were employed by the defendant on January 9, 1978; and that the defendant's conduct was wilful under Spagnuolo v. Whirlpool Corporation, 641 F2d 1109 (4th Cir. 1981), in that the defendant was aware, at the time in ques-

tion here, that its conduct was governed by the Age Discrimination in Employment Act, it is hereby ORDERED that:

1. The plaintiff will be awarded damages for back pay and fringe benefits computed as follows:

Average salary from 1/9/78 to 9/15/81[1]/	$112,832.86
Fringe benefits 1/9/78 to 9/15/81	9,313.45[2]/
	122,146.31
Less: Total Earnings	29,645.00
	92,501.31
Liquidated Damages	92,501.31
Total	$185,002.62

1. Those persons in the "class of January 9, 1978, were furloughed over the period August 1, 1981 through October 31, 1981. Since it is impossible to state at what time the plaintiff would have been furloughed or what option he might have taken which would have allowed him to continue employment to a date between August 1 and October 31, the

2. Judgment is awarded in favor of the plaintiff Gerald E. Smallwood against the defendant United Air Lines, Inc., in the amount of $185,002.62.

3. The court retains jurisdiction to make an award of costs and attorneys' fees and to enter an injunction with regard to the terms and conditions of defendant's employment of the plaintiff as of January 9, 1981.

/s/
United States
District Judge

Alexandria, Virginia
September 20th, 1982

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1. (Continued)

court has taken the mid-point between these two dates, September 15, 1981.

2. The fringe benefits actually total $44,698.96; however, all of that except $9,313.45 would have been put aside for the plaintiff's benefit in a pension plan. The injunctive relieve to be awarded shall provide that the plaintiff shall have the same options with regard to the pension as he would have had he worked until September 15, 1981.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

GERALD E. SMALLWOOD	:	
	:	
Plaintiff	:	
	:	
vs	:	Civil Action
	:	No. 79-446-A
	:	
UNITED AIR LINES, INC.	:	
	:	
Defendant	:	

Monday, September 20, 1982
Alexandria, Virginia

Transcript of the trial proceedings in the above captioned matter.

BEFORE:

The Honorable ALBERT V. BRYAN, JR., Judge United States District Court

APPEARANCES:

FOR THE PLAINTIFF:

WYATT B. DURRETTE, JR., Esquire
OF: MALONEY AND CHESS
3900 University Drive
Fairfax, Virginia 22030

FOR THE DEFENDANT:

HANS U. STUCKI, Esquire

Page 97

Lines 16-25

THE COURT: Whether the wouldn't-have-hired-anyway defense is available to the plaintiff in this case is a serious question. I think it is available as a defense. Needless to say, the burden is on the defendant asserting it to prove it by a preponderance of the evidence. And it's true that -- or at least there is some force to the argument that only those facts available to the defendant as of the time of the rejection of the plaintiff's application ought to be considered.

Page 97 (cont') It's a little hard to recreate the situation as

Page 98 it existed then, but assuming that the additional evidence adduced today by the defendant is admissible, it seems to me the Court is entitled to be, and should be, skeptical of after-the-fact decisions as to what the defendant would have done had it known what it knows now.

The inquiry that could have been made then was foreclosed by an act

Page 98 (con't)

which has now been determined to be discriminatory. Had there been an absence of the discriminatory rejection because of his age, then a suitable inquiry would have been made as to whether or not this plaintiff was an employee, whether or not his activity with his former employer was such that it would warrant the defendant from rejecting him as an applicant. As I say, that inquiry has been foreclosed by what has now been determined to be a discriminatory act on the part of the defendant.

Page 98 (con't)

It seems to me the stating that he was an employee is robbed of some of its sinister character by the fact that his former employer was listed. It was reasonable to assume that his prospective employer, United, would contact his former employer, where that former employer would give its view of whether he was still an employee, what were the circumstances under which he was terminated, if he was actually terminated, and then, as did happen in all of the other instances in which terminations or refusal to

continue with the processing of applications, the applicant himself would have been either interviewed routinely or some conversation with him had so that he could have at least have given his side of the story. That was not done here.

As I say, the reason it was not done was because he was rejected on the basis of his age, a reason which has now been determined not to be proper and to have been actually a violation of the Age Discrimination [sic] Employment Act.

Page 99 (con't)

I find that the defendant has not borne its burden of proof by a preponderance of the evidence that he would have been hired anyway after viewing their evidence, bolstered as it has been in the interim between the November 1979 hearing and now.

It will therefore be the judgment of the Court that the plaintiff is entitled to damages and injunctive relief.

I find, however, that the class in which this plaintiff would have been hired was the January

Page 99 (con't)

9 class. The January 3 class, the evidence convinces me, was made up of those persons who were hired and had to be hired pursuant to a consent decree in another court proceeding and those navigators who were included in that class. This plaintiff would not have been included in the class of January 3. He would have been, had he been hired, included in the class

Page 100

of January 9, 1978, I find.

I know there is a difference in the computation of the damages

Page 100 (con't)

as between the plaintiff, which he submitted this morning, and the defendant's, and I have not had an opportunity to compare those. I will before I enter my final decree.

Insofar as liquidated damages are concerned, under the Spagnuolo-Whirlpool case, the test of willfulness is no more than that the defendant was aware that its conduct was governed by the Age Discrimination and [sic] Employment Act. There is no suggestion here that the defendant was not so aware, and I

Page 100 (con't)

find that it was. Therefore, those damages will be doubled under the Fair Labor Standards Act, of which the Age Discrimination Act is a part.

It will, in addition to that award, double. There will be an injunction directing that the defendant process the plaintiff as it would any other person accepted for hire on January 9, 1978, that he should be subjected to the same training, physical, mental, psychological examination that any such person would have undergone. While it's a little hard to make

Page 100 (con't)

any distinction between any present physical ailment he has and any that he may have had then, if he has a present ailment, which would prevent his flying, I am not going to be the one that directs him to be allowed to fly. But insofar as the training is concerned, I will

Page 101

allow them to take into account whether he should be retained prospectively from now in his present physical and mental state. But insofar as whether he would have been processed to hire as of January 1978, his condition would be as of then,

Page 101 (con't)

and he will be, should that show that he would have passed his physical and mental tests as of then, he will be treated, as far as damages are concerned, as though he had been, subject of course to the other training that he will have to now undergo.

I will make the determination on attorney's fees. I think the plaintiff is entitled to them. The plaintiff has submitted in some detail its request for attorney's fees. The defendant has not addressed that yet.

Page 101 (con't)

How long do you want before you do address that?

MR. STUCKI: You mean here today, Your Honor?

THE COURT: No. I don't require that it be done here today.

MR. STUCKI: I suppose in ten days is reasonable.

THE COURT: Yes, indeed. I would be interested in some language on the injunctive relief, which has not been written in granite here, being submitted to the Court by both Mr. Durrette and a response to that. I

Page 101 (con't)

will hold up on entering the injunctive relief until counsel have had an opportunity to do that, and at the same time I will make a final award on counsel fees. The sooner you can do that and ....

IN THE UNITED STATES COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

GERALD E. SMALLWOOD, Plaintiff,	)	
V.	)	CIVIL ACTION NO.79-466-A
UNITED AIR LINES, INC., Defendant.	)	

O R D E R

Upon consideration of the motion of the parties for clarification as to the scope of the hearing now set for September 20, 1982, it is hereby

ORDERED that the court exercise its discretion to allow the reopening of the record and receipt of evidence on the question whether plaintiff would have been hired by the defendant regardless of his age.

/s/
United States District Judge

Alexandria, Virginia
September 10th, 1982

No. 81-1883. United Air Lines, Inc., Petitioner v. Gerald E. Smallwood

456 US 1007, 73 L Ed 2d 1302, 102 S Ct 2299.

June 1, 1982. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 661 F2d 303, 26 BNA FEP Cas 1655, 27 CCH EPD ¶ 32130.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-111

Gerald E. Smallwood, Appellant,

versus

United Air Lines, Inc., Appellee.

No. 80-1153

Gerald E. Smallwood, Appellee,

versus

United Air Lines, Inc., Appellant.

O R D E R

The petition for rehearing filed by United Air Lines, Inc. and suggestion for rehearing en banc has been submitted to the court. A poll of the court was requested, and in the poll a majority of the judges eligible to vote, voted to deny rehearing en banc.

The panel considered the petition for rehearing and is of the opinion that it should be denied.

It is ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing en banc are denied.

Entered at the direction of Judge Sprouse.

For the Court

FILED
Jan - 8 1982
U.S. Court of Appeals
Fourth Circuit

/s/
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1111

Gerald E. Smallwood,

Appellant,

v.

United Air Lines, Inc.

Appellee.

Equal Employment Opportunity Commission,

Amicus Curiae.

No. 80-1153

Gerald E. Smallwood

Appellee,

v.

United Air Lines, Inc.

Appellant.

Equal Employment Opportunity Commission,

Amicus Curiae.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Argued: February 3, 1981
Decided: October 8, 1981

Before HAYNSWORTH, Chief Circuit Judge, SPROUSE and ERVIN, Circuit Judges.

Melissa Langa, Equal Employment Opportunity Commission (Leroy D. Clark, General Counsel, Constance L. Dupre, Acting Associate General Counsel, Vella M. Fink, Acting Assistant General Counsel on brief) for Amicus Curiae; Wyatt B. Durrette, Jr. (Michael C. Montavon, Chess, Durrette & Roeder, P.C. on brief) for Appellant; Hans U. Stucki, United Air Lines, Inc. (Gregory L. Murphy, Murphy, McGettigan, McNally and West on brief) for Appellee.

CORRECTED OPINION

(Pages 13 & 14)

SPROUSE, Circuit Judge:

Gerald E. Smallwood, plaintiff below, appeals the judgment of the district court in favor of the defendant United Airlines, Inc. in his age discrimination action. After a bench trial, the district court found that United's rule denying employment to pilot applicants over the age of 35 was a bona fide occupational qualification (BFOQ) and that the airline did not violate the Age Discrimination in Employment Act[1] by refusing to employ Smallwood because of

---

[1]29 U.S.C. §§ 621-34. The Act's statement of findings and purpose is found at 29 U.S.C. § 621:

> (a) The Congress hereby finds and declares that-
>
> (1) in the face of rising productivity and affluence, older workers

his age. The major issue on appeal is whether the trial court's decision was clearly erroneous in finding factually

---

Footnote 1 continued:

> find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
>
> (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
>
> (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;
>
> (4) the existence in industries affecting commerce, of arbitrary discrimination in employment

that United had sustained its burden of showing that this age requirement is a BFOQ. We reverse.

Footnote 1 continued:

> because of age, burdens commerce and the free flow of goods in commerce.
>
> (b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

The operative section of the Act provides that

> (a) It shall be unlawful for an employer
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees

I.

Smallwood applied to United for a position as a Flight Officer[2] in August, 1977. At that time he was 48 years old and had flown 10 years for

---

Footnote 1 continued:

> in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. § 623(a). The Bona Fide Occupational Qualification exception provides that

> It shall not be unlawful for an employer, employment agency, or labor organization-
>
> (1) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to

Footnote 1 continued:

> the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

29 U.S.C. § 623(f)(1).

At trial, it was conceded by all parties that United's policy differentiated on the basis of age, and that Smallwood was within the class of persons protected by the Act. Therefore, the only issue at trial was whether United's policy constituted a BFOQ.

[2]United's operational scheme classifies members of aircraft crews as Flight Officers. Within this classification are three positions of seniority and responsibility. All new hires begin as Second Officers, or flight engineers, and then may advance to First Officer, or Co-pilot, and finally to Captain, the command officer on each aircraft. The record discloses that United operates a variety of aircraft ranging from the B-737 jet to the larger and more sophisticated B-747. A normal line of progression has a Flight Officer beginning as a Second Officer on a B-737 and moving up in equipment until they are a Second Officer on a B-747. They would then return to the B-737 as a First Officer, or Co-pilot, and again move up through United's aircraft fleet. A like system is used for advancement as a Captain.

Overseas National Airways (ONA) in a variety of positions.[3] United replied to Smallwood's employment application with a form letter which listed United's "basic qualifications." Next to "Age 21 through 29" appeared a light pencil checkmark. The letter stated that United could not offer "immediate encouragement," but that Smallwood's application would be retained on file should future reconsideration be warranted. Smallwood replied, requesting reconsideration in light of "our national policy against age discrimination in

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[3]The record indicates that Smallwood joined the ONA in 1967 and served as a first officer and captain on DC-8, DC-9 and DC10 aircraft. It should be noted that United's aircraft fleet includes both DC-8 and DC-10 aircraft and that Smallwood received flight training while at ONA at United's flight training facilities. ONA ceased operations shortly after Smallwood was furloughed in 1977. United contended at trial and on appeal that Smallwood was terminated from employment with ONA for misconduct, which Smallwood denied. This issue was not resolved at trial.

employment." United replied in December, 1977 that, while Smallwood possessed "fine qualifications," the airline was only processing applications from applicants 21 through 35 years of age. In March, 1978 Smallwood notified the Wage and Hour Division of the Department of Labor that he was charging United with age discrimination and would resort to private litigation if necessary. A conciliation hearing was held between Smallwood, representatives of the Department of Labor and United in April, 1978. On May 5, 1978, United notified Smallwood that while its pilot progression system was designed in the interest of the flying public, there were significant costs involved in the training of pilots, and when coupled with federally-mandated retirement at age 60, a maximum age of 35 at hire was necessary

to achieve peak productivity. On May 19, 1978 the Department of Labor notified Smallwood that attempts at conciliation were not fruitful and he was free to proceed as he deemed appropriate. This suit resulted.

United, in initially answering Smallwood's complaint, did not raise the BFOQ defense. In an amended answer filed 50 days later, United alleged the BFOQ exception as an affirmative defense. We find no merit to Smallwood's objection to the trial court's action allowing the amendment pursuant to Fed.R.Civ.P. 15(a). Therefore, the factual issue of whether the age limitation was a BFOQ because it was necessary for the safety of United flights was properly before the trial court.

II.

United's main evidentiary thrust at trial was that airline safety

would be adversely affected if it were forced to hire pilots over the age of 35.[4] Its contentions at trial and on appeal are two-fold: that hiring older pilots would impede its "crew concept" - the safe and effective operation of its 3-man crews in a coordinated manner- and that hiring pilots over the age of 35, significantly raising the average age of pilot personnel, would disproportionately increase the chance of medical emergencies in flight.

United's evidence was that older pilots whose experiences were with other airlines might not safely integrate with United's crews. Their expert witnesses testified that the basis of the

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[4]It should be noted, however, that United's opening statement and initial witness focused on the economic justifications for the age-35-at-hire rule.

"crew concept" was that their pilots interacted effectively because throughout their career they learned one, and only one, method of aircraft operation--United's. Their testimony focused on the fact that there was an "untraining" factor to be considered when evaluating the desirability of employing pilots with significant prior experience. It was further noted that difficulties might arise when someone moved from a command position elsewhere to a subordinate position with United. Smallwood, on the other hand, presented uncontradicted evidence that major air carriers find applicants with prior Navy or Air Force experience especially desirable.

Medical evidence profferred by United focused on the greater incidence of the conditions which require grounding in pilots ages 50-59. United theorized

that such groundings demonstrated a greater potential for in-flight incidents involving older pilots. Dr. Kidera, United's only medical witness, testified that United's company medical examinations were effective in the screening of those individuals whose medical condition posed a threat to air safety, but that medical technology cannot detect all latent health problems. He particularly stressed that it was impossible to pre-determine incidents of minor "strokes" which would probably strike older persons more frequently than younger ones. Testimony of Smallwood's expert witness, on the other hand, was centered on the high degree of certainty with which current medical techniques can predict potential cardiovascular problems. The district court expressly did not adhere to the

views of either medical expert in reaching its decision. The trial court made no written findings, but in a ruling announced from the bench adopting most of United's proposed findings of fact, found that the 35 year-old maximum age for new hires was a BFOQ, as United had borne its burden of showing that there was a factual basis for its belief that "all people over 35 would be unable to perform safely and efficiently the duties of a flight officer" and that it would be impracticable to deal with each applicant on a case-by-case basis. Viewing them, as we must, in the context of the test adopted by this court in Arritt v. Grisell, 567 F.2d 1267 (4th Cir. 1977), these findings are clearly erroneous. Fed.R.Civ.P. 52(a).

III.

There can be no doubt that United's crew concept is designed to

foster safer flight techniques. Pilots, as a group, must, of course, endure the same aging process as the general population. These unassailable observations, however, are of no help to United claiming a BFOQ exception for its hiring practices. The legal principle guiding the application of this statutory exception was settled by this court in Arritt, supra. To justify a refusal to hire under the BFOQ exception contained in the Age Discrimination in [sic] Employment Act, the burden is on the employer to meet a two-prong test:

> (1) that the bfoq which it invokes is reasonably necessary to the essence of its business . . . and (2) that the employer has reasonable cause, i.e., a factual basis for believing that all or substantially all persons within the class . . . would be unable to perform safely and efficiently the duties of the job

> involved, or that it is impossible or impractical to deal with persons over the age limit on an individualized basis.

Id. at 1271. This exception is to be narrowly applied. Burwell v. Eastern Airlines Inc., 633 F.2d 361, 370 n. 15 (4th Cir. 1980) (en banc), cert. denied, 101 S.Ct. 1480 (1981).

In reviewing the trial court's resolution of this issue we are impressed with United's overriding theme that hiring older pilots threatens it with burdensome economic effects. United, during pre-trial discovery, reiterated the position taken in its second letter to Smallwood, that is, that there are substantial costs involved in maintaining its pilot progression system, including a significant investment in training as an officer moves between positions and aircraft type. Therefore, by insisting that new pilots be under 35 years of age,

the "period of peak productivity" would be extended. Economic considerations, however, cannot be the basis for a BFOQ--precisely those considerations were among the targets of the Act. See 29 C.F.R. § 860.103(h)(1980); cf. City of Los Angeles v. Manhart, 435 U.S. 702, 716 (1978)(cost-justification defense not available in Title VII action). Taking United's defense of a safety-based BFOQ at face value, however, it still does not satisfy the Arritt burden.

United contends that it must "untrain" pilots with experience gained flying for other airlines, yet the record indicates that most new pilots are hired from a pool of ex-military pilots with many years flying experience.[5] There was

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[5]The record indicates that United requires a minimum of 350 hours of prior flight experience, and that from October, 1977 until July, 1978 would accept applications from applicants age 30-35

evidence of only one incident involving a newly hired pilot integrating into an older United crew, and no evidence, statistical or otherwise, concerning the relative ease of integration into the system of ex-military pilots, those joining United by merger, or other newly hired pilots.[6] In short, there is no

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Footnote 5 continued:

only if accompanied by advanced flight credentials. Additionally, the uncontradicted testimony of Dr. Mohler, Smallwood's expert witness at trial and former Director of the FAA's Civil Aeronautical Medical Research Institute, indicated that most of today's younger airline pilots are taken directly from the Navy or Air Force, whenever these pilots are available.

[6]In the early 1960's United merged with Capital Airlines to become, at that time, the largest passenger airline in the free world. At that point, Capital personnel were dovetailed into the United flight crew system, with a significant number of Capital command personnel, pilots and co-pilots, moving laterally into equivalent positions with United. Testimony at trial was to the effect that an incident occured due to a former Capital Captain's failure to follow a

reliable evidence that United's "crew concept" would be impaired by the sole factor of hiring Flight Officers, starting as Second Officers, over the age of 35. This alleged harm to the "crew concept" is a function of prior experience, not age at hire.

Likewise, United's medical evidence cannot establish that its age requirements are a BFOQ under the Arritt standards. Under United's pilot progression policy, Smallwood, if employed, would probably remain a Second Officer until his mandatory retirement at age 60.[7] It is undisputed that a

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Footnote 6 continued:

United procedure. The record does not indicate whether he merely deviated from United's procedure or reverted to that of Capital.

[7]FAA regulations mandate retirement of pilots and co-pilots at age 60. 14 C.F.R. § 121.383(c) (1980). United mandates retirement at age 60 of all

significant number of United's pilots maintain Second Officer status from hire to mandatory retirement to age 60. Not only is there no signficant evidence to prove "that all or substantially all persons within the class would be unable to perform safely and efficiently," Arritt, supra, but the employment of Smallwood would not create a new class or group of pilots in this respect-- he

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Footnote 7 continued

flight officers, including Second Officers. Advancement of flight cfficers is governed by United's collective bargaining agreement with the Airline Pilots Association, and is on the basis of seniority. Actual experience at United reveals that 8 to 10 years is required for advancement from Second to First Officer, and an additional 6 to 8 years from First Officer to Captain. United does not have an "up and out" policy, so it is conceivable that a flight crew member could remain a second officer indefinitely. If no officer bids on a vacancy, the position is mandatorily awarded to the most junior officer, using an inverse seniority system.

would simply become part of a group of second officers 35 years of age or over, whose continued status as pilots strongly tends to disprove United's contention that the employment of pilots in this age group violates their safety standards. Even were this not so, United's attempt to establish a BFOQ is further frustrated by the second prong of the Arritt test. United has provisions in place for the medical testing of its pilots of all ages. United's expert medical witness Dr. Kidera testified at trial that while the FAA mandates periodic physical examinations of all Flight Officers, United's company physical far exceeds the FAA's minimum requirements. Aimed at a preventive medicine approach, United includes extensive laboratory tests, blood screening, electrocariograms, urinalysis, chest x-rays and diabetes

screening. Examinations are given to Captains every 6 months and to First and Second Officers annually. The scope and depth of each examination is identical across each flight crew position. It was conclusively shown at trial that United's physical examination program was effective in detecting potentially disabling medical conditions, and that future cardiovascular problems could be detected with a high degree of predictability. These preventive medical examinations must have the same degree of predictability as to future medical disabilities for newly-hired 48- year-old pilots from other airlines as they would for career United pilots. In short, United's evidence at trial, while probative of the incidence of medical problems in pilots of advanced age and of the effectiveness of its own examination

system, failed to show a relationship between a maximum age-at-hire limitation and airline safety. It has failed to show the impossibility or impracticality of dealing with applicants individually.

IV

United, on cross-appeal, contends that Smallwood's claim is time-barred by 29 U.S.C. § 626(d)(1),[8]

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[8] (d) No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such charge shall be filed-

(1) within one hundred and eighty days after the alleged unlawful practice occurred, . . .

29 U.S.C. § 626(d)(1). This section was amended in 1978 to its current language. Previously, the section focused on "notice of intent to sue." The 1978 amendment is applicable to all civil actions brought after April 6, 1978. Smallwood's complaint was filed May 18, 1979. Smallwood's letter to the Department of Labor was captioned "Notice of Intent to Sue--Charge of Discrimination." See H. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 12, reprinted in [1978] U.S. Code Cong. & Ad. News 528, 533.

which requires that a charge alleging discrimination be filed with the Department of Labor within 180 days of the alleged discriminatory act. United's first reply to Smallwood's application was dated August 24, 1977 and was received by Smallwood shortly thereafter. The charge of discrimination was filed by Smallwood on March 24, 1978, 212 days later. United's second letter to Smallwood was dated December 12, 1977. He argues that United's refusal to employ him, communicated by the second letter, was a discrete act comprising age discrimination. (His charge was filed within 180-days from that date.) The trial court held that the discrimination was committed by United's first letter of August 24, 1977, but that Smallwood's claim was not barred because equitable considerations tolled the running of the 180-day period.

We agree the claim is not time barred, but do not reach the issue concerning equitable tolling of the statute of limitations. United's first response was a form letter on which was printed a list of United's "basic qualifications." One of the listings simply stated "age 21 through 29" and next to this, when Smallwood received it, was a light pencil check mark. Significantly, Smallwood's application was not rejected by this letter. Rather, he was informed that United could not offer "immediate encouragement" and that his application would be retained on file for possible future consideration. It was United's second letter to Smallwood that clearly rejected his request for employment. We agree with Smallwood this letter of December 12, 1977, comprised the discrete act of discrimination and

that this act occurred less than 180 days prior to the filing of Smallwood's charge with the Department of Labor.

The judgment of the trial court is, therefore, reversed and remanded for action consistent with this opinion.

REVERSED AND REMANDED.

IN THE UNITED STATES COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

GERALD E. SMALLWOOD,	)	
	)	
Plaintiff,	)	
	)	
V.	)	CIVIL ACTION
	)	NO.79-466-A
UNITED AIR LINES, INC.,	)	
	)	
Defendant.	)	

O R D E R

For the reasons stated from the bench, it is hereby

ORDERED that this action be dismissed and judgment entered in favor of the defendant. In further support of the ruling the Court adopts Paragraphs 1 through 32 and 34 of the defendant's Proposed Findings of Fact as its own.

/s/
United States District Judge

Alexandria, Virginia
November 28, 1979

IN THE UNITED STATES COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

GERALD E. SMALLWOOD, Plaintiff,	)	
v.	)	Civil Action No. 79-466-A
UNITED AIR LINES, INC., Defendant.	)	

PROPOSED FINDINGS OF FACT AND

CONCLUSIONS OF LAW

COMES NOW defendant United Air Lines, Inc. (hereinafter referred to as "United") and states as its findings of fact and conclusions of law the following:

FINDINGS OF FACT

1. This is an action brought by the plaintiff, Gerald E. Smallwood, against United in which plaintiff seeks employment with United as a pilot, compensatory and liquidated and/or punitive damages pursuant to the Age Discrimination Employment Act of 1967, 29

U.S.C. §621 et. seq., as amended (hereinafter referred to as the "Act").

2. Plaintiff is a white male born May 7, 1929, who made application to United on or about August 22, 1977, at the age of forty-eight (48) years for enrollment in United's flight officers training program.

3. Plaintiff's application was rejected on or about August 24, 1977, on the basis that he exceeded thirty-five (35) years of age, a maximum age limit established by United with respect to such applications.

4. Plaintiff gave notice to the Secretary of Labor of his intent to sue United on or about March 24, 1978.

5. United's policy relating to the hiring of pilots consists of three (3) stages:

a. A determination is made whether the applicant meets United's minimum basic requirements deemed necessary to provide a basis for further training;

b. The applicant meeting the minimum basic requirements is interviewed, administered a series of tests relating to pilot aptitude, psychological profile and general condition of health and again interviewed;

c. Applicants successfully completing stage two of the application process are

placed upon a waiting list and, to the extent requirements dictate, is subsequently enrolled in new hire training at the training center. The priority of preference to such new hired training is based upon a quantitative score achieved as a result of the processing in stage two.

6. The applicants are not employees of United and are in no manner compensated by United until enrollment in the new hire school of the training center.

7. Plaintiff Smallwood was rejected by United at the initial stage of the pilot hire program, i.e., for failure to satisfy the minimum basic requirements deemed necessary by United.

8. Upon successful completion of training in the training center and assuming job positions are available, a graduate is normally assigned to United's fleet in the entry level capacity of second officer on a 737 aircraft. Such individual, however, remains on probationary status for a period of one (1) year.

9. As a second officer for United, a pilot receives additional training relating to his or her duties upon each transition to a new type of aircraft, and he or she further receives annual training in the form of proficiency checks and proficiency tests or both.

10. The period of time served by a United pilot in the position of second officer averages eight (8) years.

11. During a second officer's tenure, a United pilot has numerous specific duties which he or she learns to perform according to United's operations procedures manual.

12. A United pilot's tenure as a second officer serves as a foundation for his service as a first officer.

13. In becoming a first officer for United, a pilot receives additional training relating to his or her duties and responsibilities as first officer.

14. Additionally, a first officer for United receives annual training in the form of proficiency checks and proficiency tests or both.

15. The period of time served by a United pilot in the position of first officer currently averages eight (8) years.

16. During his or her tenure as a first officer, a United pilot has numerous specific duties which he or she learns to perform according to United's operational procedures manual.

17. A United pilot's tenure as a first officer serves as a foundation for his service as captain.

18. In becoming a captain for United, a pilot receives additional training relating to his or her duties and responsibilities as captain.

19. Additionally, a captain for United receives annual training in the form of proficiency checks and proficiency tests.

20. During his or her tenure as a captain, a United pilot undertakes numerous and specific duties and responsibilities as detailed in United's operational procedures manual, in the

interests of best insuring the safe transportation of his passengers and crew.

21. A captain is required by the Federal Aviation Agency's mandatory retirement policy to retire at age sixty (60) and he may not at United "bid-down" to any other cockpit position.

22. The line of progression leading from initial assignment of a second officer to a 737 aircraft to the retirement of a United captain constitutes a valuable apprenticeship which, with its constant training and retraining according to United procedures, greatly enhances the safety of the travelling public by providing pilots who are highly trained and respond to various exigencies in a skilled and coordinated manner.

23. Any substantial alteration of this period of progression, either in the actual line of progression or in its duration, will necessarily cause a decrease in the high safety factor created thereby.

24. Relating to matters of health, the Federal Aviation Agency requires that all captains of commercial aircraft undergo twice annual physical examinations.

25. Over and above the Federal Aviation regulations, United maintains a separate health program which calls for annual physical examinations conducted by company physicians for all members of cockpit crews.

26. The focus of United's annual examination policy is to supplement the examinations required by the Federal Aviation regulations and,

further, to prescribe preventative measures where necessary to prevent the development of medically disqualifying illnesses or afflictions in its pilots.

27. United's efforts in establishing such a company medical program have reduced the incidents of medically disqualifying illnesses or afflictions to substantially below that of other groups within the population, including groups of pilots of at least one competing air line which lacks such a medical treatment program.

28. The great weight of medical evidence indicates that the process of aging causes a deprecation in numerous body organs and systems, including the digestive system, the lymphatic system, skeletal and muscular changes, vision and hearing losses and reductions, and decline in psychophysiological functioning.

29. Deprecation in ability to learn and/or retain information is reflected in United's own studies relating to training failures among its pilots.

30. While the rate of deprecation is dependent upon numerous factors and varies from person to person, such deprecation occurs in all persons.

31. Decline in psychophysiological functioning is pertinent and related to safety in the operation of commercial aircraft.

32. Such declines may be substantially overcome or compensated for by virtue of the individual's having been exposed for long periods of time to a standard means of operation and functioning under emergency circumstances.

33. United has created and maintained a comprehensive and very costly training system to insure the continuing capabilities of its pilots.

34. United presently employs approximately 6,000 pilots.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

GERALD E. SMALLWOOD	:	
	:	
Plaintiff	:	
	:	
v.	:	CIVIL ACTION
	:	NO. 79-446-A
UNITED AIR LINES, INC.	:	
	:	
Defendant	:	

TRANSCRIPT OF TRIAL PROCEEDINGS

Alexandria, Virginia

November 28, 1979

Before: THE HONORABLE ALBERT V. BRYAN, JR., United States District Judge

Appearances: CHESS, DURRETTE & ROEDER
BY: MICHAEL C. MONTAVON, Esquire, and WYATT B. DURRETTE, JR., Esquire
Counsel for Plaintiff

MURPHY, McGETTIGAN, McNALLY & WEST
BY: GREGORY L. MURPHY, Esquire, and HANS U. STUCKI, Esquire,
Counsel for Defendant.

Page 244 THE COURT: I

Lines 11-25 conclude that the defendant has borne its burden of establishing that its 35 year old maximum age for new hires is a bona fide occupational qualification. And in support of that conclusion I have the following factual and mixed conclusions of law.

First of all, it's not incumbent upon the defendant to convince me to a certainty that Dr. Kidera is right as opposed to Dr. Mohler. I must say that I'm persuaded by Dr. Kidera but I don't think they have to go so far as to prove to a

Page 244 (con't)

certainty that Dr. Kidera was right or that Dr. Mohler is wrong.

The defendant need only show that it has a reasonable cause to believe, and by which is meant that there is a factual basis for that belief, that all or substantially all people over 35 would be unable to perform

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safely and efficiently the duties of a flight officer.

I think Dr. Kidera furnishes that factual basis medically and I think Captain Smith establishes that factual basis in determining that

Page 245 (con't)

experience is a valid basis upon which to believe that persons hired after they are 35 would be unable to acquire the necessary experience for one reason or another to efficiently perform the duties of a flight officer.

Trhe [sic] defendant's correct, I think, in stating that the hiring of persons in an older age group, and by "older," I mean in excess of 35, increases those persons in the hire categories, and those categories statistically show a greater incidence

Page 245

of cardiovascular impairments, which apparently from the statistics make up a greater portion of the disabilities that are encountered.

The job qualification is stringent. But the defendant's entitled to impose a stringent job qualification taking into account the high degree of care and high degree of skill, the high degree of care owed by the airline in performing its business, and its business is the safe transportation of passengers from one place to another, and the high degree of skill is re-

Page 245 (con't)

quired in flight officers who have to perform that business.

I have no problem and do find that the job-relatedness which is necessary to establish the BFOQ has

Page 246

been established. Certainly the job qualification is related to the safe transportation of passengers and is reasonably necessary to that business.

Moreover, if not impossible, it seems to me it is impracticable to deal with these items on a case-by-case basis; that is, determine whether each

Page 246 (con't)

person who might be over 35 might have such qualifications that he or she could be accepted where I think a broad across the board rule is the practical and reasonable way to proceed. And for that conclusion I look to Dr. Kidera's testimony again where he said that certain of these impairments have their onset in such a subtle way that really they cannot be detected in the ordinary physical examination.

These findings I adopt as the Court's findings of fact. I will prepare an order in which

Page 246 (con't)

I will adopt what I have said from the bench and borrow perhaps from the parties' proposed findings of fact and conclusions that they've submitted.

Needless to say this renders it unnecessary to reach the question of damages. Despite the sincerity with which it's advanced, I do not base my holding on any economic hardship or economic considerations.

Court will stand adjourned. Well, I've got another matter to take up. Call the next case.

MR. STUCKI: Thank you, Your Honor.

Age Discrimination in Employment Act, 29 U.S.C.

§621. Congressional statement of find ings and purpose

(a) The Congress hereby finds and declares that --

...

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of olders persons;

...

(b) It is therefore the purpose of this chapter to promote employment of olders persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

§623. Prohibition of age discrimination

(a) It shall be unlawful for an employer --

...

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

...

(f) It shall not be unlawful for an employer, employent agency, or labor organization --

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

§626. Recordkeeping, investigation, and enforcement

...

(b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of

this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section....

(c) (1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: ...

(1975)

§216. Penalties; civil and criminal liability; injunction proceedings terminating right of action; waiver of claims; actions by Secretary of Labor; limitation of actions; savings provision

...

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages.... The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action....

(1965)

Federal Rules of Civil Procedure

Rule 52. Findings by the Court. (a) Effect. ... Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses....

FILED
JUL 2 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-2058

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GERALD E. SMALLWOOD,

Petitioner,

v.

UNITED AIR LINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GERALD E. SMALLWOOD,

Petitioner,

v.

UNITED AIR LINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

THE RESPONDENT, UNITED AIR LINES, INC.* [HEREINAFTER "UNITED"] RESPECTFULLY PRAYS THAT THE PETITION FOR A WRIT OF CERTIORARI REQUESTED HEREIN BY GERALD E. SMALLWOOD [HEREINAFTER "SMALLWOOD"] BE DENIED.

STATEMENT OF THE CASE

We will set forth the factual and procedural background briefly. We urge this Court to rely upon the opinion of the Fourth Circuit for a fair, accurate and succinct statement of the facts.

---

* United Air Lines, Inc. is a corporation, and its parent corporation is VAL, Inc. with offices at 1200 Algonquin Road, Elk Grove Village, Illinois 60666.

Factual Background

On August 22, 1977, a lawyer who had been trained as a pilot applied for a position as a pilot at United (Tr. Transcript, Sept. 20, 1982, p. 63). In his application, Smallwood stated *inter alia* that he was then employed by Overseas National Airways ["ONA"] and that he was 48 years old (Plaintiff's Ex. 1, 1st Trial). United rejected Smallwood's application pursuant to its long-standing policy—which it believed in good faith to be safety-based—that it would not hire any pilot over 35 at the time of his/her application.[1]

Because of Smallwood's failure to meet United's maximum age hire requirement, his application was not processed further (Tr. Transcript, Sept. 20, 1982, pp. 40-41). Thus, it was not until preparation for the initial trial that another basis for Smallwood's disqualification became known to United. At this time, it was learned that Smallwood had been fired by ONA for violations of its regulations, specifically the use of an air travel card for unauthorized transportation and fraudulent procurement of expenses for a move not actually accomplished (Tr. Transcript, Nov. 28, 1979, p. 103). After a hearing before a neutral arbitration panel, the charges were sustained but the penalty was changed from discharge to an 18-month suspension (Defendant's Ex. 1, 2nd Trial). None of those facts was disclosed on Smallwood's application to United.

Still another lawful basis for not hiring Smallwood came to light when, pursuant to the District Court's Order of October 20, 1982, to process his employment application (Pet. Am. App. 66-67), it was found that he just met United's minimum standards in an aircraft simulator, but did not meet its min-

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[1] Similar policies were not uncommon in the airline industry. *See, e.g., Murnane* v. *American Airlines*, 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982).

imum medical qualifications for hire as of 1978. United then advised Smallwood that he would not be hired.[2]

Procedural History

Smallwood's suit against United for age discrimination was first tried on November 28, 1979. At this first trial United sought to defend against the charge of an Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ["ADEA"], violation by asserting, first, that its rule under which it refused to process Smallwood's application met the requirements of a bona fide occupational qualification ["BFOQ"] within ADEA, and, second, that he would not have been hired as a pilot even if there had been no age discrimination. The district court judge, however, confined the trial to the validity of the BFOQ claim and refused to permit United to develop fully, or to rule, on its second defense (Pet. Am. App. 3).

The record establishes that, contrary to Petitioner's statement, United never abandoned its adamant denial that Smallwood was qualified for employment with United as a pilot. United attempted, albeit unsuccessfully, to develop a full record of Smallwood's lack of qualifications, including his incomplete disclosure on his United application and his premeditated fraud on his prior employer, Overseas National Airlines, and ONA's subsequent termination of his employment, later converted to an 18-month suspension by a neutral arbitration panel. As the Fourth Circuit noted:

> The district judge made it clear throughout the first trial in this case that he was considering only the violation issue. Thus, he repeatedly—ultimately, with considerable emphasis and finality—ruled that he would not permit the defndant to inquire either on cross-examination of the

---

[2] This failure to meet medical qualifications was never litigated as the District Court denied United's Motion for Further Proceedings Necessitated by Compliance with the Court's Injunctive Order and supporting affidavit.

> plaintiff or by direct evidence fully into the circumstances of plaintiff's termination as a flight officer by his previous airline employer, Overseas National Airways (ONA). (Pet. Am. App. 22)

Additionally, to put the first trial in context, Smallwood sought only injunctive relief that United *process him for hire*, not that United hire him; he did not put in issue whether he was qualified for hire—physically, mentally or in terms of aeronautical skill. United never admitted Smallwood met those qualifications.

Second, United never stipulated, as Petitioner claims, to Smallwood's prima facie case of liability and damages. United did admit that it had a maximum age hire policy, and that it had refused to hire Smallwood under that policy. Apparently, on the basis of this admission, the District Court opened the first trial by *ruling* on the pleadings that Smallwood had established a prima facie case (Tr. Transcript, Nov. 28, 1979, pp. 3-4). The court made its ruling without hearing any evidence. Following this ruling, Smallwood's entire direct case "on damages" consisted of a series of stipulated numbers as to what his salary would have been, had he been hired. As soon as those numbers were admitted, the District Court held that the burden shifted to United to prove its claimed exemptions (Tr. Transcript, Nov. 28, 1979, p. 8). The Court did not make a finding nor does the record provide a basis for finding that Smallwood was "qualified" for hire. And, in fact, as the evidence shows, he was not.

Finally, Smallwood insists that at the second trial, held September 20, 1982, United "stipulated to Smallwood's evidence that he was still qualified for the job and to damage evidence" (Pet. Brief 3). What United stipulated to was plaintiff's counsel's statement that if Smallwood were to testify, he would state "he has a current medical certificate from the FAA" and that his "medical condition is the same now as it was

at the time, and that all of the other basic minimum qualifications are still the same, and, of course, are still met" (Tr. Transcript, Sept. 20, 1982, p. 10). Stipulating as to what Smallwood would testify is hardly stipulating to the conclusion that he was "still qualified."

ARGUMENT

The Petitioner does not state any legitimate special or important reason for this Court to exercise its discretion and grant certiorari to this already extensively litigated matter. Basically, the Petitioner, a lawyer-pilot who was initially denied employment by United on the basis of his age, but who would not have been hired anyway because of a fraud he perpetuated on his prior airline employer and because he was not medically qualified, contends that: (1) the courts below should not have allowed United to develop a full and complete record as to his qualifications or lack thereof as a pilot and (2) he is entitled to backpay make-whole damages under ADEA even though he never would have been hired by United absent any age discrimination. These complaints simply do not justify the grant of certiorari.

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN OPENING THE RECORD FOLLOWING REMAND TO RECEIVE FURTHER EVIDENCE ON ISSUES NOT RESOLVED AT THE FIRST TRIAL

This Court has held previously that "[a] motion to submit additional proof is addressed to [a trial judge's] sound discretion." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 331 (1971). That discretion will be interfered with only where its abuse has been clearly shown. *Colage* v. *University of Tennessee,* 544 F.2d 297, 301 (6th Cir. 1976) (no abuse where, after case had been submitted, the court asked defendant to submit additional evidence). It has been noted that reversal will occur "only in a rare case." 6A Moore's Federal Practice, Paragraph 59.04 at 59-38 (1983).

Ignoring this prior holding and commonly accepted standard, Petitioner argues that this Court should review this case because district courts require guidance in determining when to take additional evidence on remand (Pet. Brief 5-8). Failing to

cite cases in conflict or even a single authority, Petitioner urges this Court to believe that the District Court below acted improperly in permitting the parties to develop a full record on remand. In doing so, however, Petitioner fails to indicate how he was prejudiced by a complete record. Additionally, contrary to Smallwood's assertion, United does not agree there is a lack of guidance on this issue (Pet. Brief 7). The discretion of the trial court in reopening the record is an accepted standard which simply does not require the attention of this Court.

It is clear from the record that, on remand, the District Court properly invoked this standard, issuing an order that it:

> exercises its discretion to allow the reopening of the record and receipt of evidence on the question whether plaintiff would have been hired by the defendant regardless of his age. (Pet. Am. App. 101).

In light of its rulings at the first trial prohibiting United to introduce evidence of the circumstances of Smallwood's discharge by ONA, this was not an abuse of discretion and permitted the Court to correct what may have been reversible evidentiary rulings.

The damaging evidence received at the second trial, which Smallwood so vehemently decries, is merely the decision of the ONA System Board of Adjustment, with the Opinion of the Neutral Referee, about which United's counsel had attempted to question Smallwood at the first trial (Defendant's Ex. 1, 2nd Trial). The Court also received the testimony of Melvin Volz, United Vice President—Flying and a member of the Pilot New Hire Review Board, concerning United's employment policies as they would have borne on processing Smallwood's application, supplementing the testimony of United Captain J. D. Smith offered at the first trial (Tr. Transcript, Sept. 20, 1982, pp. 11-56; Tr. Transcript, Nov. 28, 1979, pp. 111-160). This evidence was uncontradicted by Smallwood.

In conclusion, the three years since the District Court's initial decision, the increased significance of the question whether Smallwood would have been denied employment for reasons other than age, the absence of any indication by the District Court of its inclinations on that issue before the additional evidence was submitted, and the District Court's limitation on the presentation of this evidence at the first trial, all supported the Court's decision to reopen the record. The District Court did not abuse its discretion and this issue offers no compelling basis to grant certiorari.

II. BIFURCATION OF LIABILITY AND DAMAGES, COMMON IN EMPLOYMENT DISCRIMINATION CASES, IS ALSO PROPER IN ADEA CASES

As acknowledged by the Fourth Circuit, there are generally two issues in disparate treatment discrimination cases: (1) the substantive violation and (2) the remedy (Pet. Am. App. 11-19). These separate and distinct issues have long been recognized in Title VII and Section 1981 cases. *See, e.g., Teamsters* v. *United States*, 431 U.S. 324 (1977). There is absolutely no reason not to apply the same analysis to cases under ADEA, which was patterned on Title VII. *See, Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756 (1979).

In its opinion, the Fourth Circuit reviewed the history of bifurcation in this context, starting with *Mt. Healthy School Board of Education* v. *Doyle*, 429 U.S. 274, 285-87 (1977), and its specific application in the employment discrimination context, *Teamsters* v. *United States*, 431 U.S. 324, 326 (1977), and *East Texas Motor Freight* v. *Rodriguez*, 431 U.S. 395, 403-04, n. 9 (1977). In the latter case, this Court said:

> Even assuming, *arguendo*, that the company's failure even to consider the applications was discriminatory, the company was entitled to prove at trial that the respondents had not been injured because they were not qualified and would not have been hired in any event.

Thus, this Court has previously sanctioned a two-part analysis, or bifurcation, in employment discrimination litigation.

Following this Court's precedent, the Fourth Circuit has consistently recognized and followed the rule as stated in *Rodriguez*, the most recent illustration of which being *Patterson* v. *Greenwood School Dist. 50*, 696 F.2d 293, 295 (4th Cir. 1982), as have other circuits. *See, Murnane* v. *American Airlines, Inc.*, 482 F.Supp. 135 (D.D.C. 1978), *aff'd*, 667 F.2d 98 (D.C.Cir. 1981), *cert. denied*, 456 U.S. 915 (1982); *Nanty* v. *Barrows*, 660 F.2d 1327, 1334 (9th Cir. 1981). Therefore, while there is no question that bifurcation is not required, neither is it improper in employment discrimination cases.

Nevertheless, in the face of this established authority, Smallwood asks the Court to grant certiorari on the basis of his flimsy argument that the "procedural contexts" of *Teamsters* and *Rodriguez* render their approval of bifurcation inapplicable to employment discrimination cases in general (Pet. Brief 8-11). Nothing in those decisions supports such an overly restrictive interpretation. Moreover, the Fourth Circuit is not alone in applying bifurcation in age cases. *Murnane, supra.*

Furthermore, the procedural history of the case at bar illustrates the logic of such an approach. While the District Court did not expressly bifurcate the instant litigation, its rulings had just that effect. The trial judge, refusing evidence on whether or not Smallwood would have been hired absent age discrimination, restricted his holding at the time of the first trial to a finding of no substantive violation because of a lawful BFOQ. When this decision was reversed, it was necessary for the Court to address the issue it did not decide, *i.e.*, whether United had established by the preponderance of the evidence that it would not have hired Smallwood absent age discrimination. The resolution of that issue required the full examination of Smallwood's termination as a flight officer by his former airline employer. This case is a classic example of

the need, as well as logic, of bifurcating employment discrimination trials. The procedure was highly appropriate and does not require this Court's scrutiny.

III. THE RECORD FULLY SUPPORTS THE FOURTH CIRCUIT'S REVERSAL OF THE DISTRICT COURT'S FINDING THAT UNITED DID NOT PROVE THAT IT WOULD NOT HAVE HIRED SMALLWOOD FOR REASONS OTHER THAN AGE

On remand, United had the burden of rebutting, by a preponderance of the evidence, a presumption that Smallwood was entitled to employment and backpay as a result of United's discrimination. *See Sledge* v. *J. P. Stevens & Co.*, 585 F.2d 625, 636 (4th Cir. 1976), *cert. denied*, 440 U.S. 981 (1979). United did so by presenting uncontradicted evidence that, in the absence of discrimination, it would not have hired Smallwood anyway.

However, without making specific findings of fact of its own or indicating disagreement with any of the factual findings set forth in the Report filed by the impartial arbitration Referee, the District Court held against United. As stated by the Fourth Circuit:

> The only clue to the district judge's rationale for his decision against the defendant's defense appears in three comments made by him in his oral opinion and his later clarification. No one of these comments relates to the actual facts and circumstances of the "alleged fraud" practiced by the plaintiff against his employer, ONA. The factual showing in the record of such misconduct by the plaintiff while in the employment of ONA seems to have been accepted by the district judge. The district judge's primary objection to the defendant's defense as based on these undisputed facts was that these facts and the conclusion they required represented an "after-the-fact rationale," because the facts had not been "available" to the defendant at the time the latter refused to process plain-

> tiff's application for employment. He declared that he had great doubt whether such "after-the-fact" evidence should be admitted but if "admissible" it was the duty of the court to view it with skepticism. It seems, also, that the district judge felt that the defendant should have, before refusing to process the plaintiff's application, offered the plaintiff an opportunity to give his side of his difficulty with ONA. (Pet. Am. App. 40-41; *see* Pet. Am. App. 83).

The trial court gave no support for these propositions; in fact, the authority is to the contrary. *Mt. Healthy School Board of Education* v. *Doyle*, 429 U.S. 274, 287 (1977); *Patterson* v. *School District 50*, 696 F.2d 293, 296 (4th Cir. 1982); *Gibson* v. *Mohawk Rubber Co.*, 695 F.2d 1093, 1097 (8th Cir. 1982); *Murnane* v. *American Airlines, Inc.*, 667 F.2d 93 (D.C.Cir. 1981), *cert. denied*, 456 U.S. 915 (1982); *Rodriguez* v. *Taylor*, 569 F.2d 1231, 1240-41 (3rd Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). The Fourth Circuit, on the basis of the record evidence, properly reversed this erroneous finding.

The undisputed testimony of United witnesses J. D. Smith and Melvin E. Volz, together with the documentary evidence contained in Defendant's Exhibits 1-7, conclusively proved that United had, at the time of Smallwood's application, established policies of rejecting applicants who had an employment history of acting dishonestly with a prior employer, or who misrepresented their history on United's application form; it also proved that this policy has been consistently applied. Petitioner asserts that the District Court heard the testimony of Volz and Smallwood, weighed their credibility and found Smallwood more convincing than Volz (Pet. Brief 14-15). No such thing occurred. Smallwood (Tr. Transcript, Sept. 20, 1982, pp. 57-74) and Volz (Tr. Transcript, Sept. 20, 1982, pp. 11-56) did not testify about the same events, and did not contradict each other; there was, accordingly, no occasion for the court to "weigh their credibility" and determine who was more convincing.

Furthermore, even if it were a legitimate fact-finding posture, the District Court had no cause to be skeptical of United's "after-the-fact" evidence. Courts may reasonably be skeptical when new employment policies emerge after discriminatory employment decisions have been made. But the policies involved here were well-established when Smallwood applied for hire—indeed, they are obvious. As to the weight of "after-the-fact" rationalizations, the District Court did not express any doubts whether United would, in fact, have certainly uncovered the fact of Smallwood's discharge by ONA simply by processing his application, or whether United would have investigated the matter as relevant to his employability. On the contrary, the District Court expressly found that United *would* have considered whether the underlying reasons for Smallwood's discharge affected its own employment decision.

The District Court's final reason for finding against United was that Smallwood was not allowed the opportunity of giving "his side of the story.[3] As noted by the Court of Appeals, such consideration is misplaced (Pet. Am. App. 48-49). Petitioner was given such an opportunity not only in his lengthy arbitration hearing but also at both trials.

It is obvious from Petitioner's Brief that, while arguing that the Fourth Circuit "went out of its way to construe the record in such a manner as to ignore totally the evidence that supported the District Court's decision for Smallwood" (Pet. Brief 11-12), Petitioner does not deny that, in fact, he defrauded his prior employer and did not fully disclose his employment status with ONA on his application to United. The Fourth Circuit's

[3] The evidence was that United, on receiving reports of prior misconduct against a former employer, did *not* invariably ask the applicant for his "side"—indeed, it sometimes rejected the application without telling the employee the reasons, to protect its sources of information—and it is highly doubtful that United would have asked Smallwood to tell his "side" (Volz Testimony, Tr. Transcript, Sept. 20, 1982, pp. 22-23).

recitation of the facts concerning Petitioner's fraudulent activities is true and not distorted (Pet. Am. App. 27-39).

In conclusion, the Fourth Circuit had ample grounds for finding:

> It is thus clear that, so far as any of the reasons assigned even obliquely by the district court as a basis for dismissing the defendant's defense, they cannot justify a dismissal of the defendant's defense. Moreover, the facts in support of the defense [the grounds for plaintiff's discharge by ONA] are fully detailed in the record and completely justified the defendant's action. Under these circumstances, the district court's conclusion dismissing this defense based on the reasoning stated by such court, is clearly erroneous. (Pet. Am. App. 50-51).

It is not necessary for this Court to grant certiorari to review this well-reasoned opinion supported totally by the record evidence.

IV. SMALLWOOD, WHO NEVER WOULD HAVE BEEN HIRED EVEN ABSENT DISCRIMINATION, IS NOT ENTITLED TO BACKPAY

Petitioner contends that, even though he would not have been hired anyway based on facts existing at the time he filed his application for employment with United and facts which would have been developed in a reasonable processing of such application, he nonetheless is entitled to backpay from the date of discrimination through the second trial. The Fourth Circuit properly found this position to be untenable (Pet. Am. App. 58-62).

The purpose of ADEA is to make persons whole for injuries suffered as a result of unlawful discrimination. The Act provides legal and equitable remedies to eliminate the unlawful practices and to restore the aggrieved person to the position he would have been in had the illegal discrimination not occurred. 29 U.S.C. § 626. Consistent with this purpose of recreating the

circumstances that would have existed in the absence of illegal age discrimination, the general rule is that aggrieved persons are not entitled to recover damages if they would not have been hired anyway. *See, e.g., Gibson* v. *Mohawk Rubber Co.*, 695 F.2d 1093, 1097 (8th Cir. 1982); *Houghton* v. *McDonnell Douglas Corp.*, 627 F.2d 858, 863-66 (8th Cir. 1980).

Smallwood argues otherwise, relying, albeit mistakenly, solely upon *Rodriguez* v. *Taylor*, 569 F.2d 1231 (3rd Cir. 1977), *cert. denied*, 436 U.S. 913 (1978), and *Houghton*. Neither of those cases bears the weight Smallwood puts on them. The Fourth Circuit handily distinguished them from Smallwood's situation (Pet. Am. App. 60-64, n. 14).

To summarize the basic differences, the plaintiff in *Rodriguez* demonstrated at trial that he had the physical and mental capabilities necessary for the job of security guard for the City of Philadelphia, whereas in *Smallwood* there is no finding whatever on qualifications. Additionally, after Rodriguez had established a prima facie case, the defendant failed to offer any evidence that Rodriguez was in any way unqualified, thus never proving that Rodriguez would not have been hired because he could not pass the required Civil Service exam. United adduced clear proof at trial why it would never have hired Smallwood.[4]

---

[4] The Third Circuit in *Rodriguez* also acknowledged that administration of a standardized examination to a single candidate would not have been costly to the employer nor would it have unduly complicated its hiring process. 569 F. 2d at 1241, n. 17a. Such is not the case herein. At any given time, United has on file between 13,000 and 16,000 active applicants for pilot positions. The hiring process is a complex and costly three-step review: 1) scrutiny of application information and preference ranking on basis of qualifications; 2) interview, aeronautical evaluation, preliminary physical examination and previous employment verifications; and 3) psychological test, aircraft simulator evaluation and thorough physical examination (Tr. Transcript, Nov. 28, 1979, pp. 116-119).

The plaintiff in *Houghton* was awarded backpay from the date he was terminated as a test pilot on grounds of age to the last date on which he had, by prior trial and appeal, affirmatively proved (through a medical examination on the ending date) that he *was* physicially qualified. Smallwood never established physical qualifications.

Under the circumstances of this case Smallwood, like the plaintiffs in *Murnane, Patterson* and *Gibson,* is not entitled to backpay. The purpose of a backpay award is to make the plaintiff whole, *i.e.,* to restore him to the position he would have occupied but for the discrimination. Smallwood, who was not physically qualified and who had lied to and cheated his previous employer, would never have been hired by United as a pilot. Therefore, any award would be an undeserved and improper windfall.

V. TRUTHFULNESS, RELIABILITY AND HONESTY ARE JOB-RELATED CRITERIA FOR PILOTS AND CAN BE LAWFULLY CONSIDERED IN EVALUATING APPLICANTS

In the face of the record in this case, Petitioner actually tells the Court that honesty and integrity are subjective criteria which are not job-related (Pet. Brief 22-25). As the Fourth Circuit characterized his argument:

> What the plaintiff contends is that trustworthiness, reliability and honesty are in no way required or expected of a pilot of a large commercial plane, to whose substantially unsupervised competency, trustworthiness, reliability, and fidelity to the rules and regulations is committed the safety of the scores of passengers on the plane he pilots. (Pet. Am. App. 53).

The Court of Appeals rightfully refused to accept that argument, stating:

> The logs a pilot maintains, the accuracy of his reports, the faithful and exacting observance of all the safety rules and regulations and their accurate and punctual recording, all

> are vital to the safety of the plane's passengers and all depend on the trustworthiness, truthfulness and reliability of that pilot aloft, where he operates largely free from any effective supervision. Any argument that the only qualification of such a flight officer is his mechanical ability to manipulate the various controls of the plane completely lacks conviction. And the evidence in this record demonstrates the necessity for these additional qualifications of trustworthiness and reliability. (Pet. Am. App. 53-54).

Not only United's witnesses but also the impartial arbitration referee confirmed this essential qualification of honesty for a pilot of a commercial airline.

No more need be said. Petitioner's argument is, at best, baseless, and, at worst, disingenuous.

CONCLUSION

For the reasons stated, this Court should deny the Petition for a Writ of Certiorari.

Dated: June 28, 1984

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GERALD E. SMALLWOOD,
Petitioner,

v.

UNITED AIR LINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The Petitioner, Gerald E. Smallwood (hereinafter "Smallwood"), in reply to the Respondent, United Air Lines, Inc., (hereinafter "United"), requests the Court to grant him a Writ of Certiorari.

United, in its brief in opposition to Smallwood's Petition for a Writ of Certiorari, makes numerous inaccurate statements of the record and proceedings in this case. The purpose of this Reply is to correct these inaccuracies. In contrast to United's request for this Court to rely upon the Fourth Circuit's statement of facts, Smallwood, for the reasons set forth in his Petition, urges the Court to review the transcripts of the proceedings for a fair statement of facts.

ARGUMENT

I. United Interjects "Facts" at This Stage of the Proceeding That Were Never Introduced as Evidence and Never Accepted as "Facts" by a Court.

In its Factual Background and Argument, United states that it had a lawful basis for not hiring Smallwood because he failed to meet minimum medical qualifications for hire. (Respondent's Brief in Opposition at 2, 4, 6, 15). United asserts that this position as "fact" even though it never put on one shred of evidence, at either hearing, as to a medical disqualification, and even though no court in this long-litigated case made a determination of medical disqualification. In fact, the District Court specifically refused to reopen the record to hear United's argument on this point. United's attempt to interject this argument as "fact" at this point of the proceedings, despite the well-established rule that the argument of the parties on appeal cannot substitute for findings by a trial court, *E.E.O.C. v. United Virginia Bank, et al.*, 555 F.2d 403 (4th Cir. 1977), is typical of the erroneous representations it makes throughout its Brief.

II. The District Court did not Confine the First Trial to the Issue of Liability.

United repeatedly characterizes the District Court as "refusing evidence" on its would-not-have-hired-anyway defense and "confin[ing] the trial" to the liability question. (Respondent's Brief in Opposition at 3, 7, 8, 9). A review of the transcript shows the District Court did nothing even close to what United claims. Excerpts from the transcript make this clear:

> THE COURT: Gentlemen, insofar as the order of proof is concerned, the defendant concedes that it differentiates . . . on the basis of age. It seems to me, therefore, except for the damages by the plain-

> tiff, the burden is on the defendant to prove its exemption under the BFOQ. . . .
>
> MR. STUCKI: . . . If the Court rules that establishes a prima facie case, then indeed the only matter to be left would be the matter of damages.
>
> * * * *
>
> THE COURT: What's the purpose of this examination?
>
> MR. STUCKI: The purpose of this matter will go to damages, your Honor . . . It is a question as to his qualifications as to whether he would have been hired by United Airlines [sic] in light of the basis for the discharge. And in that respect it goes to the matter of damages.
>
> THE COURT: All right. Go ahead.

11/28/79 Trans., pp. 3, 101-102. *See also* 11/28/79 Trans., pp. 7-8, 101-11, 119-22, 213-14; 9/10/82 Trans., pp. 5-10.

Indeed, if the District Court had desired to bifurcate the trial, it would have sustained Smallwood's objection following the exchange quoted above. 11/28/79 Trans., pp. 102-03.

United uses the bifurcation facade to justify its supplementation of its weak evidence showing at the first hearing. United admits that its only evidence was the ONA System Board of Adjustment decision, with the opinion of the Neutral Referee, and the testimony of Volz. (Respondent's Brief in Opposition at 7). The decision and the opinion existed prior to the first hearing, as evidenced by their dates, and United's own admission.

> Thus, it was not until *preparation for the initial trial* that another basis for Smallwood's disqualification became known to United. At this time, it was learned that Smallwood had been fired by ONA for violations of its regulations . . . .

(Respondent's Brief in Opposition at 2) (Emphasis added). Despite its prior knowledge, without any asserted justification, United failed to present the evidence at trial. Volz was listed as a witness for United at the first trial, but United, for reasons unknown, did not call him to testify. Clearly, the District Court would have admitted this evidence at the first trial had United presented it. *See, e.g.*, 11/28/79 Trans., p. 108. United chose not to present the evidence and instead fabricates the bifurcation argument to minimize the impact of its first evidentiary failure.

Interestingly, United argues that the reopening of the record was correct, not only because of the bifurcation, but also because of the "increased significance of the question whether Smallwood would have been denied employment for reasons other than age." (Respondent's Brief in Opposition at 8). Since United could not have known prior to trial how the Court would rule on its BFOQ defense, its other defense was equally important to defeating Smallwood's claim. It has become no more, nor less, important with the passage of time.

III. A Trier of Fact Is not Obligated to Accept Evidence as Fact, Even if It Is Uncontradicted, if It Is not Persuasive.

United argues repeatedly that it presented uncontradicted evidence through its witness, Volz, of its policy not to hire applicants of questionable good faith and that, thus, it would not have hired Smallwood. (Respondent's Brief in Opposition at 7, 10, 11). Even if this were true, which Smallwood has argued to the contrary in his Petition (Petitioner's Brief at 11-17), such evidence is not required to be accepted as fact by the finder of fact, whose job it is to access credibility. *Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U.S. 401 (1899). Even the Fourth Circuit's opinion supports this position by applying the clearly erroneous standard. If there were no

credibility question, the Fourth Circuit could have used a less stringent standard of review. *United States v. General Motors*, 384 U.S. 127 (1966); *Hicks v. United States*, 368 F.2d 626 (4th Cir. 1966). United cites no support for a contrary position. The District Court was simply not persuaded by the testimony of United's employee and United's argument that it would not have hired Smallwood because of its policy.

This type of finding is not only in keeping with rules governing the assessment of credibility but is entirely consistent with Title VII proceedings outlined by the Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), where the trier of fact must decide if the alleged lawful reason for non-employment of plaintiff by the defendant is merely a pretext for discrimination. The District Court may have concluded that United's concern over Smallwood's history with ONA was but a pretext, a reason it gave for not hiring Smallwood because of his age. This position is reinforced by United's failure to discuss with Smallwood his difficulties with ONA, an opportunity given to every other applicant listed by United as establishing its policy. (Appellant's Opening Brief to the Fourth Circuit at 14).

IV. There was no Reason for Smallwood to "Respond" to the Referee's Opinion.

United repeatedly stresses that (1) Smallwood did not respond to nor refute the contents of the Referee's Opinion, and that (2) a full examination of the ONA arbitration was necessary in this case. (Respondent's Brief in Opposition at 9, 10, 12).

The question presented to the District Court was: Given the fact of Referee's Opinion and the fact that Smallwood listed ONA as his employer on his application, would United have refused to hire Smallwood? *See* 11/28/79 Trans., pp. 105, 107. Contrary to United's argument, the resolution of this issue does not require

"the full examination of Smallwood's termination as a flight officer by his former airline employer." (Respondent's Brief in Opposition at 9). Since United either would or would not have hired Smallwood knowing these facts, the merits of the ONA arbitration are irrelevant.

It is precisely because the merits of the Referee's Opinion are irrelevant to the question presented that Smallwood did not deny or refute the allegations in the Opinion, certainly not because he thought they were accurate. A response to the merits would have been inappropriate, particularly given the District Court's repeated statement that it would not try the merits of the ONA dispute. 11/28/79 Trans., pp. 105, 107-08.

This is further sustantiated by the fact that the Referee's Opinion was admitted without a hearsay objection from Smallwood. Obviously, if the Opinion had been submitted for the truth of the matter asserted, it would have been objectionable hearsay. But, as a review of the transcript shows, it was not offered or accepted into evidence to prove the matters asserted therein, but, instead, to prove that there was an arbitration decision that said what it said. *See* 11/28/79 Trans., pp. 101-111, 119-122. Inasmuch as the Opinion was not offered for the truth of the matter asserted, any testimony Smallwood would offer on the merits of the ONA dispute would have been inadmissably irrelevant.

Until the Fourth Circuit's opinion issued, no one suggested that Smallwood should have defended himself on the merits of the Referee's Opinion in his case against United. In fact, the District Court was of the exact opposite view. It is disingenuous, at best, for United to attack Smallwood now on such a fabricated point.

V. A Writ of Certiorari Has Been Granted in *Phyllis A. Anderson v. City of Bessemer City, etc.*

In his Petition, Smallwood cited and relied upon a Petition for a Writ of Certiorari in *Phyllis A. Anderson*

v. City of Bessemer City, Etc., No. 83-1623, as fully briefing the extent to which the Fourth Circuit has undertaken a pattern of *de novo* review and reversal of district court decisions in favor of plaintiffs in employment discrimination cases. The Court granted Anderson's petition. In addition, the Court agreed to hold another petition for a writ of certiorari in *Lula B. Miller v. Mercy Hospital*, 720 F.2d 356 (4th Cir. 1983), *cert. pet. pend.*, No. 83-1629, until disposition of the *Anderson* case. *Miller*, like *Smallwood*, was one of the cases cited in Anderson's petition as establishing this reversal pattern at the Fourth Circuit. *See* Petition for Certiorari, *Anderson v. City of Bessemer City, Etc.*, No. 83-1623, pp. 14-16. Consistency suggests that Smallwood's petition should likewise be granted, or at a minimum, be held pending the Court's decision in *Anderson*.

CONCLUSION

For the reasons stated herein and in his Petition, Smallwood respectfully requests this Court to grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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